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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 1421

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1962

No. .....

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Paul John Carbo, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming judgments of the United States District Court for the Southern District of California sentencing petitioner to 25 years' imprisonment and to pay a fine of $10,000.00 [C. T. 1495].[1]

[1]The record as certified to this Court by the Clerk of the court below consists of 69 volumes. Volumes 1 through 6 is the Clerk's Record, hereinafter referred to as C. T., in the District Court; Volumes 7 through 16 is an Abstract of Testimony [A. T.] made by the successor judge (the trial judge having died subsequent to the verdict of the jury; but before sentence and before passing on motions for new trial); Volumes 17 through 68 is the Reporter's Transcript, herein referred to as R. T., of the trial; Volume 69 is the Clerk's Record in the Court of Appeals, herein referred to as R. C. A.

Opinions Below.

Trial in the District Court was by jury.

The opinion of the court below [R. C. A. Slip Opinion, 314 F. 2d 718] is appended hereto as Appendix "A."[2]

The judgment of the court below is appended hereto as Appendix "B."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is February 13, 1963 [R. C. A. Judgment].

2. Timely filed petition for rehearing was denied on March 19, 1963 [R. C. A. Order]. Mr. Justice Douglas granted an extension of time within which to file petition for writ of certiorari to and including May 18, 1963.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1).

Questions Presented for Review.

1. In a conspiracy prosecution, where the evidence discloses declarations of alleged co-conspirators made in the absence of other alleged co-conspirators, should not the jury be instructed that a defendant's membership in the alleged conspiracy must be established by

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[2]There were opinions by the Court below (288 F. 2d 282; 288 F. 2d 686, cert. den. 365 U. S. 861; 300 F. 2d 889; 302 F. 2d 456) and by Mr. Justice Douglas (7 L. ed. 2d 769, rev. den., 369 U. S. 868) deciding questions of bail during and after trial, but not going to the merits of the case. And there was an opinion by this Court (364 U. S. 611) before trial, on a procedural point.

that defendant's own acts, conduct or declarations, and that the declarations of an alleged co-conspirator made in the absence of that defendant, cannot be used by the jury for the purpose of establishing the absent defendant's membership in the conspiracy?

1a. As a subsidiary question to the one just posed, must not the jury, in such a conspiracy prosecution, be instructed that before it can consider the declarations of an alleged co-conspirator made in the absence of a defendant, against the absent defendant, there must be independent evidence of the existence of the conspiracy, of the membership of the declarant in it and of the connection of the non-present defendant with it?

2. Where the facts are in sharp dispute and the credibility of the witnesses gravely in issue, may a successor judge who has neither seen nor heard the witnesses, properly pass on motions for new trial, or does Rule 25, Federal Rules of Criminal Procedure, require that under these circumstances a new trial be granted?

3. May the prosecution, as a part of its case in chief, charge and introduce evidence as to the alleged reputation of a defendant?

3a. Corollary to this, does an indictment which charges some of the defendants with having "underworld" reputations, offend the requirements of the Fifth and Sixth Amendments?

4. May surreptitiously obtained electronic evidence be admitted into evidence?

5. Did the petitioner receive a fair trial as required by due process of law?

6. Petitioner relies also on the other questions posed by the other petitioners.

Constitutional Provisions and Statutes Involved.

Involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution; 18 U. S. C. 271 (62 Stat. 701); 18 U. S. C. 875(b) (62 Stat. 741); 18 U. S. C. 1951 (62 Stat. 793) and Rule 25, Federal Rules of Criminal Procedure. They are set out hereinafter as Appendix "C."

Statement of the Case.

The trial court had jurisdiction under 18 U. S. C. 3231.

The contention of the prosecution was that all of the defendants (Carbo, Gibson, Palermo, Sica and Dragna)[3] had entered into two conspiracies to extort from Leonard Blakely and Donald Paul Nesseth a portion of the moneys due the manager of Don Jordan, a professional prize-fighter, from the purses earned by Jordan as such prize-fighter, and also to extort from Blakely and Nesseth control of the professional activities of said fighter. It was further contended that these objectives were to be accomplished by threats of physical harm and violence and threats of economic

[3]The court below reversed the conviction of Dragna and ordered his acquittal (Appx. A, 63). Separate petitions for writs of certiorari are being filed in this Court by the other defendants. The facts are here set out in summary form. To avoid duplication they are set out more fully in the petition for writ of certiorari being filed by defendant Sica.

injury to Blakely and Nesseth and by the use of the alleged underworld reputations of two of the defendants, Sica and Dragna [C. T. 2-3, 9-10].

The counts in the Indictment charging the substantive offenses of extortion [C. T. 6, 7], attempted extortion [C. T. 8] and interstate telephone threats [C. T. 12-16] all arose out of or are connected with the counts charging the conspiracies above-mentioned.

The substance of the prosecution's case is based mainly upon the testimony of the witness Leonard Blakely, or, as he is designated in the testimony, Jackie Leonard, and upon the testimony of the witness, Donald Paul Nesseth.

The evidence in the case is in sharp conflict and the credibility of the prosecution witnesses seriously in issue.[4]

The jury found all the defendants guilty on all the counts charged [C. T. 951-960].

Following the verdicts, motions for new trials were filed [C. T. 962, 965, 968, 978]. Prior to the time set for the hearings on those motions, and on June 11, 1961, the trial judge, the Hon. Ernest A. Tolin, passed away. On June 26, 1961, the Hon. George H. Boldt, as his sucessor, was designated pursuant to Rule 25, Federal Rules of Criminal Procedure [C. T. 1064].

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[4]This fact is the more significant in relation to the Rule 25 point discussed below, page 13. (See also Question 2 of Questions Presented, *supra*, at p. 3.)

Subsequent to Judge Boldt's appointment as successor judge, Supplemental Motions for New Trial were filed [C. T. 988, 998, 1054]. These motions were based upon the ground that Judge Boldt could not properly nor satisfactorily perform the duties devolving upon him in this case by reason of his appointment as successor judge, and, particularly, the duty of passing upon the motions for a new trial made by the respective defendants, which duty involved passing upon the issue of the credibility of the witnesses and also the issue of the conflict in the evidence [C. T. 989-994, 999-1004, 1055-1060].

All motions were denied [C. T. 1342, 1491].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Certiorari Should Be Granted to Settle the Important Question, Never Before Passed Upon by This Court, as to Whether, in a Conspiracy Prosecution Where the Evidence Discloses Declarations of Alleged Co-Conspirators Made in the Absence of Other Alleged Co-Conspirators, the Court Must Instruct the Jury That the Declarations of an Alleged Co-Conspirator Can Not Be Used by the Jury for the Purpose of Establishing the Absent Defendant's Membership in the Conspiracy.

The backbone of the prosecution's case consisted of statements purportedly made by each of the alleged co-conspirators outside the presence of the other alleged co-conspirators.

Petitioner requested in a number of ways[5] that the trial court instruct the jury it could not use the out-of-presence statements of an alleged co-conspirator against a non-present defendant to establish membership in the conspiracy of the absent defendant. These instructions were refused [R. T. 7719] and their im-

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[5]The requested instructions are set out hereinafter in Appendix "D." The matter goes to the very heart of the elements of the crime which the prosecution must prove, so that, even had petitioner not requested the instructions, or if his requests were erroneously phrased, the trial court would have been obligated to instruct on its own and the failure so to do would have been reversible error. (*Screws v. United States*, 325 U. S. 91, 106-107; *United States v. Massiah*, 307 F. 2d 62, 71 (C. A. 2, 1962), and cases cited.)

port was not covered by any instructions the court did give [R. T. 7651-7657, 7714-7719]. Petitioner also requested (see Appx. D) instructions that the jury could not use the declarations against the absent defendant, unless it was satisfied by evidence other than those statements, *i. e.*, by evidence aliunde as the cases put it; that there was a "conspiracy,"[6] that the declarant was a member of that conspiracy and that the non-present defendant was a member of it. These instructions were likewise refused [R. T. 7719] and also not otherwise covered [R. T. 7651-7657, 7714-7719]. The Court below ruled (Appx. A, 30) that petitioner's requested instructions did not represent the law; that the independent evidence rule was only one of admissibility. In effect, this was a ruling that once the trial judge determined there was sufficient independent evidence to admit the hearsay statement, then the flood gates are opened and the jury can use the out-of-presence declarations to determine if the non-present defendant was a member of the conspiracy. Accordingly, the court below has sanctioned a rule which, indeed, permits "hearsay (to) lift itself up by its own bootstraps." (*Glasser v. United States*, 315 U. S. 60, 75).

The very discussion of the problem by the court below demonstrates its importance and the necessity for this Court to consider the question. Thus, the court concedes (Appx. A, 30) that "the situation is . . . confusing," and that the instructions urged by petitioners have been held proper by "many cases" (Appx. A, 35). And it acknowledges (Appx. A, 35) a conflict between it and the Sixth Circuit. Moreover, the court

[6] See discussion, *infra*, as to the use of this word.

does not suggest that any case decided by this Court has determined the question; and none of the three authorities cited by the appellate court as "persuasive" (Appx. A, 32) is a case adjudicated by this Court. Petitioners believe that the rule announced by the court below is contrary to the rationale of *Glasser*, *supra*, and the other rulings of this Court mentioned hereinafter; and is in conflict with the decisions we cite from other Circuits. But at minimum, the question has not been decided. It is eminently one for decision here.

In reaching its conclusion, the court below relied (Appx. A, 31-32) upon statements made by way of dictum in *Dennis v. United States*, 183 F. 2d 201, 230-231 (CA 2 1950) and in the civil case of *Rowley v. Braly*, 286 S. W. 241, 245 (Tex. *Civil* Appeals, 1926)[7] and on a statement in a footnote in Maguire & Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 40 Harvard Law Review, 392, 415.

We submit that the rule enunciated by the court below is contrary to, and in conflict with, the other authorities in the field (*Schmeller v. United States*, 143 F. 2d 544, 551 [CA 6 1944]; *Bartlett v. United States*, 166 F. 2d 920, 924 [CCA 10, 1948]; *Hauger v. United States*, 173 Fed. 54, 57 [CCA 4 1909]; *Montford v.*

[7] In *Dennis*, the discussion relied upon by the court below was not directed to the point being urged here. Moreover, after stating as it did, the court in *Dennis* said (183 F. 2d at 231): "Be that as it may, we need not decide the point. . . ." In *Rowley*, the court instructed the jury not to consider the statement "for any purpose," not even against the declarant who was charged as one of the conspirators. In a later case, on another point, the *Rowley* case was held to "not represent the law." (*Bayou Properties Company v. Gobble*, 347 S. W. 2d 314, 315 (Tex. Civ. App. 1961).)

United States, 200 F. 2d 759, 760 [CA 5 1952], Mathes, "Some Suggested Instructions for Particular Federal Criminal Cases," 27 F. R. D. 105, 125; *United States v. Richards*, 149 Fed. 443, 452 [D. Neb. 1906]; *Briggs v. United States*, 175 F. 2d 317, 320 [CA 10 1949], cert. den. 338 U. S. 861; *United States v. Flynn*, 216 F. 2d 354, 362 [CA 2 1954]; *People v. Talbot*, 65 Cal. App. 2d 654, 663; Developments in the Law—Criminal Conspiracy, 72 Harvard Law Review 920, 987 [1959]; Levie, "Hearsay and Conspiracy—A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule," 52 Mighican Law Review, 1159, 1176 [1954]; 22 C. J. S. 1125-26).

The reasoning of the Court below for the adoption of its rule is (1) that instructions such as requested by petitioner would require the jury to "compartmentalize the evidence" and that this is an impossibility (Appx. A, 33) and, (2) there is no occasion to resort to the declaration if the jury must first find from other evidence that the non-present defendant is a member of the conspiracy (Appx. A, 31). Neither ground we respectfully submit, is valid.

As to the first, the jury is constantly being required to "compartmentalize." A striking example is the very rule in conspiracy cases that requires an instruction be given the jury that an out-of-presence declaration by an alleged co-conspirator after the conspiracy has ended, can be considered only against the declarant and not against the absent defendants (*Paoli v. United States*, 352 U. S. 232, 237; *Fesvick v. United States*, 329 U. S. 211, 217; *Logan v. United States*, 144 U. S. 263, 308-309; *Lutwak v. United States*, 344 U. S. 604,

618-619). And see *Lutwak, supra,* and *Kotteakos v. United States,* 328 U. S. 750, 776-777 for the teaching that precisely in a conspiracy case must the instructions be careful and precise to "safeguard each defendant, individually. . . . from loss of identity in the mass" and that "the jury (must be) instructed as to such declarations and the limitations put upon them."[8]

Nor is there any more validity in the reasoning of the court below in connection with the principle suggested in the second ground which it advances. The Circuit Court reasoned (Appx. A, 31) that petitioner's contention is: "You may not consider this evidence unless you first find the defendant guilty." This is not petitioner's contention. Petitioner does not contend that the jury may not consider the out-of-presence declaration in determining the ultimate question of guilt or innocence. He does contend that in deciding whether the absent defendant is a member of the "conspiracy," the jury may not use the declaration for that purpose. The mere fact that, by other evidence, a defendant is found to be a member of the "conspiracy" does not make him guilty of a crime. There must be some action taken in furtherance of the conspiracy or there is no crime—the defendant is not "guilty." (18 U. S. C. 371; *Yates v. United States,* 354 U. S. 298, 344; *United States v. Rabinowich,* 238 U. S. 78, 86;

[8] *Cf.* the approval by the court below in this very case (Appx. A, 44) of the "limited consideration which might be given" to the reputation testimony which was admitted into evidence.

Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114, 1123). The Circuit Court's difficulty, it seems to us, is that it failed to distinguish the two meanings given to the word "conspiracy": one, as the agreement between the parties (which is not, in and of itself, a crime); and the other, as the agreement plus an act in furtherance of, or to effectuate the object of, the agreement, which is a crime. That is, a mere agreement with no effort to effectuate it, does not constitute the crime of conspiracy *(ibid)*. Thus viewed, the declaration by an alleged co-conspirator in the absence of a defendant—once the absent defendant has been shown to be a member of the "conspiracy"—may serve the prosecution a very useful purpose, without which it may have no case at all.[9] In other words, the co-conspirator exception to the hearsay rule permits the prosecution to show a declaration of an alleged co-conspirator made *in furtherance of the "conspiracy" (United States v. Guido*, 161 F. 2d 492, 495 [CA 3 1947]). An absent defendant, shown by other evidence to be a party to the "conspiracy," *i.e.*, to the agreement, is bound by that declaration, but such declaration itself—the co-conspirator declaration—cannot be used to show that the absent defendant is a party to the agreement.

The question merits this Court's review.

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[9]In this connection, it is not without significance that one of the overt acts alleged by the prosecution is that [C. T. 5] "(o)n or about May 14, 1959, co-conspirator William Daly had a conversation with Leonard Blakely."

II.

Certiorari Should Be Granted Because of the Importance to the Administration of Criminal Justice in the Federal Courts of, and Because This Court Has Heretofore Not Passed Upon, the Question of the Appropriate Application to Be Made of Rule 25, Federal Rules of Criminal Procedure in a Case Where the Credibility of the Prosecution's Chief Witnesses Is a Serious Issue and the Evidence Is in Sharp Conflict.

This Court has never passed upon, either by way of interpretation or application, a case involving Rule 25, Federal Rules of Criminal Procedure. The question is of obvious and recurring importance. This Court and Congress recognized this in the very promulgation of the Rule itself.

The reasoning of the court below in disposing of the Rule 25 Point, fairly emasculates, we respectfully submit, the Rule and denied to petitioners their right to a proper consideration of their motions for new trial.

No contention is made by respondent that the evidence is not in sharp conflict, nor that the credibility of the prosecution's chief witnesses is not a serious issue. The court below recognizes (Appx. A, 7) the "vigorous" denial of the testimony of the prosecution's chief witness, Leonard; it acknowledges (Appx. A, 57) that "Leonard was caught up in a falsehood with reference to his alleged solicitation of hush money from appellants"; and that "government counsel in argument to the jury conceded that Leonard was not testifying truthfully in this regard." In its capacity as an appellate review court, in passing on the sufficiency of the

evidence in the face of the "attack on the credibility of Leonard," the court below ruled that it would "not disturb the jury's determination in this respect" (Appx. A, 25) but it failed to recognize that the function of a trial judge in passing on a motion for new trial is quite different from that of a court on appeal. In so doing it denied to petitioner a fundamental right to which he is entitled.

On a motion for new trial, the trial judge does indeed "weigh the evidence" (*United States v. McGonigal*, 214 F. Supp. 621, 622 (D Del. 1963) and sits "as the thirteenth juror" (*Applebaum v. United States*, 274 Fed. 43, 46 (CCA 7 1921). We submit that in a case such as this, where the credibility of the prosecution's chief witnesses is of crucial importance, this "weighing" process simply cannot be done by a judge who was not present at the trial and who did not see the witnesses nor hear the testimony. *Cf.* this Court in *United States v. Johnson*, 327 U. S. 106, 112, commenting on the fact that the trial judge, who "conducted the original trial and had watched the case . . . unfold from day to day . . . was exceptionally qualified to pass on the" motion for new trial questions. It is for this reason that a trial court's decision on a motion for new trial based on questions of fact is not normally subject to review. (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247, 248; *United States v. Johnson*, 327 U. S. 106, 111, *supra*). But the basis for this rule is the trial judge's expertise precisely because he had the opportunity of watching the case "unfold from day to day." This expertise was denied petitioner.

The court below said (Appx. A, 61-62) that the successor judge did not abuse his discretion in passing on the motions for new trial because he "spent more than three months in a careful study of the record" and "expressed his conviction . . . that (the trial judge) 'had not the slightest doubt of the guilt of any of the defendants[10], or of the credibility of the principal witnesses.'" With due respect, we suggest that the successor judge's excursion into the mind of the trial judge was an impossibility; and was just as hopeless as his trying to ascertain the credibility of the witnesses whom he never saw nor heard, regardless of the amount of time—be it three months or be it three years—spent reading a cold record. At minimum, the decision of the Court of Appeals is in conflict with the dictum of the Eighth Circuit in *Connelly v. United States*, 249 F. 2d 576, 580 (1957),[11] a conflict which this Court should resolve.

We need not labor the point as to the importance of demeanor in adjudging credibility and thus in arriving at the truth. This Court has recognized this in the past *(Guzman v. Pichirilo*, 369 U. S. 698). And only this Term has reiterated it *(Townsend v. Sain*, 372 U. S. 293, 322): "Where an unresolved factual dispute exists, demeanor evidence is a significant fac-

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[10] *Cf.* the Court below's reversal as to defendant Dragna (Appx. A, 25-26).

[11] "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. . . ."

tor in adjudging credibility. And questions of credibility, of course, are basic to resolutions of conflicts in testimony."

Rule 25 is a salutary rule designed to cover an ever recurring problem. A motion for new trial is a right which should not be denied a defendant by a failure to apply the Rule in its true sense. Hearing should be granted by this Court to give guidance to the trial courts in this important matter.

III.

Certiorari Should Be Granted Because the Right of Petitioner to Freedom From Unreasonable Search and Seizure Under the Fourth Amendment Was Abridged by the Admission of Evidence Surreptitiously Obtained by the Use of Electronic Devices.

a.

Exhibit 177 is a recording of a telephone conversation between Leonard and defendant Palermo on May 5, 1959 [R. T. 6708, 6710, 7547-7554]. It was obtained by means of an induction coil specially placed on Leonard's telephone, with Leonard's consent, specifically to intercept this very conversation, but without the knowledge or consent of Palermo [R. T. 6711].

We contend that this type of telephone message interception and divulgence thereof, violated both the Fourth Amendment guarantee against unreasonable search and a seizure and also §605 of the Federal Communications Act (47 U. S. C. 605; 48 Stat. 1103). The recording was therefore inadmissible in evidence (*Silverman v. United States*, 365 U. S. 505 and *Nar-*

donne v. United States, 308 U. S. 333). This question has never been passed upon by this Court.

The court below held (Appx. A, 37) that the exhibit was not illegally obtained; that *Rathbun v. United States,* 355 U. S. 107, was dispositive. We respectfully disagree.

In *Rathbun,* stating the question to be decided, this Court said (355 U. S. at 107):

> "This case concerns the issue of whether the contents of a communication overheard on a *regularly used* telephone extension with the consent of one party to the conversation are admissible in federal court. . . ." (Emphasis added.)

There is a vast difference between a regularly installed telephone extension and an induction coil especially placed for the purpose of hearing a particular conversation.

The Government in its brief before this Court in *Rathbun* recognized the distinction and pointedly made it in support of its argument. Thus in its brief, the Solicitor General argued:

Page 12:

> "The legislative history shows that Congress intended to safeguard the privacy of means of communication by forbidding the *surreptitious interjection of an independent device* for the purpose of interception by a listener or a recorder, not to protect the message from disclosure by the receiver." (Emphasis added).

To show that an extension phone is not a "surreptitious interjection of an independent device for the pur-

pose of interception by a listener or a recorder," the Government further said in its brief (page 17, f.n. 9):

> "The use of the term 'extension' may be misleading. In general use, all telephone instruments installed in a home are on a parity; no one is the principal receiver and the others subsidiary. In this case, it appears to have been a matter of chance, or convenience, which instrument Mr. Sparks used. Thus, the use of the word 'extension' really means another *regularly installed* telephone instrument." (Emphasis added).

And demonstrating the difference between a regularly installed and used extension phone, and the device used in the case at bar, the Solicitor General called the following to the attention of the Court (pp. 16-17, f.n. 8):

> "Orders of the Federal Communications Commission dated November 26, 1947, and May 20, 1948, applying to interstate and foreign calls, require telephone common carriers to post tariff schedules for the permanent attachment of mechanical recorders and transcribers to subscriber telephones. . . . (T)here are three general types of recording devices which may be used with a telephone circuit. The first relies upon a direct physical connection to the telephone circuit. This system is subject to detailed regulation as mentioned above.[12] The second is the inductive type which relies upon the use of an *in-*

[12] *Cf. United States v. Stephenson*, 121 Fed. Supp. 274 (D. C. D. C. 1954), app. dism. 223 F. 2d 336 (C. A. D. C. 1955), holding inadmissible a recording made from this type of an installation without the "beep."

duction coil placed in proximity to the telephone lines. The Commission regards its use as prohibited by the Commission's orders. The third is the accoustic type which amplifies and records the telephone message as it is reproduced at the handset. The Commission expressly has not attempted to regulate the use of this type. (Citation)." (Emphasis and footnote added).

As distinguished from an induction coil placed on a telephone for the *specific* purpose of overhearing a *particular* conversation, this Court pointed out in *Rathbun* (355 U. S. at 111):

> "Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one *ordinarily used* instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. . . ." (Emphasis added).

Contrary to the situation thus spoken of by the Court, a party to a telephone conversation does not take the risk that the party on the other end will have a device attached by Governmental investigative agencies to the telephone which, without his knowledge or consent, records the conversation. In contrast to the use of an extension phone and the listening thereon, the use of the induction coil device without the consent of the party, has all the vice of an actual wire-tap and falls within the conduct Congress sought to ban by

§605; it is another variant of official intrusion into privacy. The whole tenor of this Court's opinion in *Rathbun* makes clear that it was only because the hearing by the third party was on a *regularly* installed extension phone, not a device installed *on* the phone *for the purpose* of hearing *that* conversation, that it held there was no interception and therefore no violation of §605.

Thus, this Court said (355 U. S. at 108):

> ". . . This extension had not been installed there just for *this* purpose (to overhear this particular conversation) but was a *regular* connection, previously placed and *normally* used. . . ." (Emphasis added.)

Accordingly, *Rathbun* did not decide, but clearly left for another day—this day, we urge—determination of the law applicable to the factual situation of the instant case. This is likewise true of *Schwartz v. Texas,* 344 U. S. 199. That case, which, by reason of *Mapp v. Ohio,* 267 U. S. 643, may very well no longer be authority for what it held—that evidence obtained in violation of §605 of the Communications Act is admissible in the state courts—left undecided the question as to whether induction coil listening, as in the case at bar, amounts to interception and if so, whether the sender had authorized it. "These questions," said this Court (344 U. S. at 203-204) "can only arise in a federal court proceeding."

This is that proceeding. Hearing should be granted because of the importance of the question and the widespread use of the practice.

b.

Exhibits 100, 101, 102 and 176 are tapes or wires of a conversation between Leonard and unindicted alleged co-conspirator, Daly, in the latter's room at the Ambassador Hotel outside the presence of any of the defendants [C. T. 1357-1413]. They were obtained either by way of a Minifon (a miniature wire recorder) [R. T. 755], or a Fargo device (a concealed radio transmitter [R. T. 2340, 6702]. Petitioner contends the admission of those tapes violated his Fourth Amendment rights.

The importance of the question as to whether this kind of evidence may be admitted and this Court's concern in the now generally prevailing practice of obtaining evidence in this surreptitious electronic manner is demonstrated by the Court's grant of certiorari in *Lopez v. United States*, No. 236, Oct. Term, 1962, now awaiting decision. It can be expected that the decision by the Court in that case will have a bearing on the instant case. Accordingly, we withhold extended comment on the matter to await the Court's decision there.

We note, however,[13] that the petitioner in *Lopez* did not ask this Court to reconsider *On Lee v. United States*, 343 U. S. 747. Petitioner here asks this Court to do just that. This Court has recently made clear that the Fourth Amendment is not limited to physical, tangible materials. In *Wong Sun v. United States*, 371 U. S. 471, 485, it said "that the Fourth Amendment may protect against the overhearing of verbal statments as well as against the more traditional sei-

[13]Brief for the United States in *Lopez*, page 33.

zure of 'papers and effects.'" Hence it protects against invasions by sophisticated, pervasive, modern electronic devices, as well as against the cruder, more violent, methods of the past.

IV.

This Court Has Never Decided, but Should, the Important Question of Whether the Prosecution May Directly Charge in the Indictment the Bad Reputation of Defendants and Introduce, as Part of Its Case in Chief, Evidence of the Reputation of Defendants Without Defendants' Having Ever Put Their Reputations in Issue. Additionally, the Reputation Charges in the Indictment Violate Petitioner's Rights Under the Fifth and Sixth Amendments.

The indictment charged [C. T. 2, 10] that it was a part of the alleged conspiracies to enlist the services of two of the defendants, Sica and Dragna, "known to the said victims to have underworld reputations." And at the trial Leonard was permitted, over objection, to testify that "by reputation I have always known of Joe Sica as an underworld man and a strong arm man," [R. T. 722] and that "(a)lthough I didn't know Mr. Dragna, by reputation I have always heard he was connected with the underworld." [R. T. 734]. Likewise, Nesseth, over objection, was permitted to say, "I knew Sica by reputation only as being an underworld figure" [R. T. 1865] and as to Dragna, "(t)he same" [R. T. 1865], (as to his reputation) "Yes, that he was an underworld figure, in my opinion." [R. T. 1866].

It would appear that what was done here is contrary to all the teachings as to the use of reputation evi-

dence by the prosecution in a criminal case *(Michelson v. United States,* 335 U. S. 469, 475-6).[14] The portent of the doctrine urged by the Government is startling and ominous.

The court below sanctioned the use of Leonard's and Nesseth's testimony as to Sica's and Dragna's alleged reputations on the ground that these defendants[15] "stood in the position of a dangerous weapon to be used to strike fear into the hearts of Leonard and Nesseth" (Appx. A. 41). The analogy, we submit, is not apt.

A gun is an object—a specific object. It can be described; it has shape; it has dimension; it can be shown to and examined by the jury. An alleged underworld reputation is quite different; it is amorphous, of undefined contour, structureless. Moreover, in contrast to a gun, against which a defendant may defend factually that he did not use it,[16] an allegation as to bad reputation as an essential charge in the indictment[17] and presentation of alleged evidence concerning it, are calculated to evoke sentiment, emotion

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[14]"The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." See also, *Marshall v. United States,* 360 U. S. 310.

[15]The court discussed the matter (Appx. A. 39-45) as though only Sica's alleged reputation had been testified to. But as seen, both Sica's and Dragna's alleged bad reputations were charged and testified about and used against petitioner.

[16]There is no evidence in the record that any of the defendants—certainly not Carbo—knew of the alleged underworld reputations of Sica or Dragna.

[17]The prosecution said that the reputation allegations constituted "an essential portion of the indictment" [C. T. 59].

and prejudice. The effect of the admission of this type of evidence is such as to overwhelm the mind of the jury and is so prejudicial as to leave the defendant with no defense.[18]

The formless character of Subparagraphs (c) of Counts 1 and 5 of the Indictment [C. T. 3, 10][19] is demonstrated by this Court's decision in *Lanzetta v. New Jersey*, 306 U. S. 451, holding a statute making it a crime to be a "gangster" to be "so vague, indefinite and uncertain that it must be condemned, as repugnant to the due process clause of the Fourteenth Amendment." (306 U. S. at 458). See also, *Cramp v. Board of Public Instruction*, 368 U. S. 278, 286-7.

At least, the statute in *Lanzetta* attempted to define the word "gangster."[20] No such, nor any, attempt at definition of the word "underworld" was made here. There is none in the indictment. No instruction was given to the jury (*Cf. Killian v. United States*, 368 U. S. 231, 258). Indeed, the prosecution carefully

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[18]This Court has, on a number of occasions, reversed convictions where, even though the proceedings appeared on their face to be regular, in actuality they were unfair or presented situations in which it was doubtful that the defendant could really defend himself. For example: *Irvin v. Dowd*, 366 U. S. 717, 728; *Chambers v. Florida*, 309 U. S. 227, 241; *Moore v. Dempsey*, 261 U. S. 86, 91; *cf.* similar views expressed by Mr. Justice Holmes, then in dissent, in *Frank v. Mangum*, 237 U. S. 309, 347.

[19]"It was further a part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands."

[20]Although it made no attempt to define the word "gang."

eschewed offering a definition during the trial.[21] On the contrary, the prosecution required one of the defendants, Gibson, to define the word. The prosecution, under an instruction from the court that the testimony "may be received only as to the defendant Gibson" [R. T. 5035], asked Gibson on cross-examination what he, Gibson, meant by the word "underworld" when Gibson had answered a question put to him containing that word when he was a witness at a previous proceeding after the alleged conspiracies charged in this case were over [R. T. 5037-5050]. Nothing that Gibson might have said in any proceeding at any time or at any place with reference to his interpretation of the word "underworld," could have remedied the Grand Jury's defective allegation in the Indictment which failed to interpret or give meaning to that term. To permit Gibson's definition to supply "what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure." *(Russell v. United States*, 369 U. S. 749, 770).

Even in the context of the Gibson cross-examination, the court said (quoting from the dictionary that

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[21] R. T. 5039:

"Mr. Goldstein (the prosecutor): Well, I certainly don't intend to tell Mr. Gibson what the word 'underworld' means. It is what Mr. Gibson thinks the word 'underworld' means that is relevant. I have some very clear views on what 'underworld' means, but I think it might be error for me to state those views in the presence of the jury."

the word means "a place of departed spirits" [R. T. 5041] and "the side of the globe opposite to one" [R. T. 5042]), "it . . . is subject to various definitions," [R. T. 5035], "(t)here have been different meanings to the term given at different times," [R. T. 5043] and "(i)t's a term that is susceptible to many modifications and the like." [R. T. 5044]. All this was in the presence of the jury.

If the statute passed upon in *Lanzetta* is so vague, indefinite and uncertain as to violate due process, then the underworld reputation charge in the indictment here is subject to the same vice, for it fails to apprise the defendant "of what he must be prepared to meet." *(Russell v. United States*, 369 U. S. 749, 764). A conviction obtained under such an indictment cannot, under the Fifth and Sixth Amendments, be permitted to stand *(ibid*, 369 U. S. at 760).

It cannot be gainsaid that the question is novel. The prosecution so conceded in the trial court and acknowledged that "(t)he precise point before this Court appears to be one of first impression." [C. T. 360]. Nor can it be argued that the question is not an important one.

We respectfully urge it to be self-evident that certiorari should be granted on this point.

V.

Certiorari Should Be Granted Because the Convictions and Sentences Resulted From a Proceeding Which Denied Petitioner a Fair Trial, Calling for the Exercise of This Court's Power of Supervision.

For example:

1. Nesseth and McCoy, not alleged to be co-conspirators, were permitted, over objection [R. T. 1764], to testify as to what Leonard, also not alleged to be a co-conspirator, told Nesseth, outside the presence of any defendant, as to what Gibson [*e.g.* R. T. 1783], Palermo [*e.g.* R. T. 1798] and Carbo [*e.g.* R. T. 1824] allegedly told Leonard. This was straight out-and-out hearsay. The co-conspirator exception to the hearsay rule stretches the rules of evidence far enough; even its use, under any theory, is carefully circumscribed. There was no need, and it was clearly prejudicial, to add to "the too easy abuses to which the charge of conspiracy may be put." (*Van Molkte v. Gillies*, 332 U. S. 708, 727, Mr. Justice Frankfurter, concurring.)

The court below approved the reception of the evidence on the theory (Appx. A, 51) that the testimony of Nesseth and McCoy was relevant proof of the state of mind of Leonard. The difficulty with the court's reasoning is that the evidence was not offered by the prosecution on the theory of the state of mind of Leonard and so, of course, no instruction was given so limiting the jury's use of the evidence. The prosecution offered the testimony as *substantive* evidence of what Gibson, Palermo and Carbo are supposed to have told

Leonard [R. T. 1765; C. T. 1459, 1460]. The unlimited reception of the evidence was most unfair.

2. The trial court permitted Leonard, over objection [R. T. 1660], to testify that he had received threatening telephone calls from persons never identified, and not connected up with any defendant, during the period May 20, and November 1, 1959 *(ibid)* and that he had been frightened by them [R. T. 1663], the clear implication being that defendants had made the calls, although Government counsel told the court, but *not the jury*, that he did not claim any of the alleged threatening conversations were with any of the defendants [R. T. 1661].

The court below sustained this type of testimony on the theory (Appx. A, 48) that it was a proper method of rehabilitating a witness. The court said *(ibid)* that on cross-examination of Leonard the defendants "had attempted to impeach Leonard's credibility by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25.000.00."[22] and that on redirect the Government sought to show that this was founded not on corruption but on fear. But this theory does not bear scrutiny.

It was not on cross-examination that the question of Leonard's receiving money from Palermo was brought up; nor whether Leonard authorized anyone, including his wife, to contact Palermo. These matters were brought up by the prosecution on the direct examination of Leonard. To the questions as to whether

[22]That Leonard tried to do just that cannot be gainsaid as the court below itself held [Appx. A, 57; Ex. E].

he had ever authorized any one, including his wife, to contact Palermo; Leonard answered "No.", [R. T. 766]. This was an out-and-out falsehood as later brought out on cross-examination [R. T. 1653, 1655; Ex. E]. Thus the testimoney of Leonard on re-direct that he had received threatening phone calls and was frightened by them [R. T. 1663] was utterly irrelevant for the purpose of rehabilitating him from the falsehood, that he had not authorized his wife to contact Palermo [R. T. 766]. And as to the very question, this was brought up by the prosecution, not by the defendants [R. T. 766].

The admission of the evidence was highly improper and prejudicial.

3. The manner in which the false Leonard testimony was treated by Government counsel did not comport with the standards required of a prosecutor by the demands of due process, and by *Napue v. Illinois*, 360 U. S. 264.

It will be remembered that it was the prosecution which brought up the question as to whether Leonard had received any money from Palermo and as to whether Leonard had authorized anyone, including his wife, to contact Palermo since May 20, 1959 [R. T. 755-6]. On direct examination Leonard testified, as previously noted, that he had not authorized his wife to contact Palermo [R. T. 766]. But on cross-examination, after the playing of the recording [Ex. E] and

Leonard's admission that he was willing to accept $25,000.00 from Palermo [R. T. 1265], the falsity of his testimony became evident.[23]

Nonetheless, the prosecutor represented to the jury that nothing offered by the defense had impeached Leonard [R. T. 6827], that Leonard was not a perjurer [R. T. 7529], that he was basically honest [R. T. 6943] and not motivated by greed or profit [R. T. 6902].

Before the successor judge on the motion for new trial, the prosecutor made similar assertions. Although that judge, sitting in the place of the trial judge, had the duty of weighing the evidence and adjudging the credibility of the witnesses (a duty which, as we contend [*supra*, Point II], he was unable to perform properly), the prosecutor represented unequivocally [R. T. 7950]: "'. . . Leonard was *completely* truthful.'" (Italics added).

Accordingly, the prosecutor has effectively allowed "false testimony to go uncorrected" (*Napue v. Illinois*, 360 U. S. at 269).

4. The Leonard testimony of anonymous telephone calls was not the only instance of such evidence being received. Chargin was allowed to testify that on June 4, 1959, he received a call from someone, with no attempt even to identify him, warning him to stay out

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[23]We suggest that, from the following remark of the prosecutor to the jury, in the course of final arguments, the inference is inescapable that the falsity was manifest to him:

"There would seem to be no question that they (Leonard and Mrs. Leonard) had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. 'I don't think there is any doubt of that' [R. T. 7055].

of Hollywood, that he knew what had happened to Jack Leonard [R. T. 2237-2239]. The unfairness of allowing this sort of evidence is manifest. The court below approved of its use (Appx. A, 47-48) on the theory that there was sufficient evidence[24] to warrant the jury's finding that the call had been made by or at the direction of one of the conspirators and therefore binding on all. This is piling inference upon inference: first that Leonard had received a beating (as to which there is no evidence [see f.n. 24, *supra*]), second that the alleged co-conspirators or one of them had administered, or caused to be administered, the beating (*ibid.*), third that the language of the telephone call ("You saw what happened to Jack Leonard" [R. T. 2239]) referred to a beating of Leonard by the alleged conspirators, and, fourth, that the telephone call had been made by one of the alleged co-conspirators. Such speculative inference piling is not permitted. (*Ingram v. United States*, 360 U. S. 672, 680; *Direct Sales Co. v. United States*, 319 U. S. 713, 711; see also *Galloway v. United States*, 319 U. S. 372, 395; *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 578; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 488; *Manning v. John Hancock Mutual Life Ins. Co.*, 100 U. S. 693, 25 L. Ed. 761, 763.)

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[24]The court below said (Appx. A 18]: "Leonard had received a beating and had been hospitalized."

The basis for this statement by the court, presumably, was the assertion to that effect in the Government's brief below, page 232. But neither of the references cited [R. T. 2882, 6358] is evidence to support the statement that Leonard had received a beating, nor, if he had, that any of the alleged co-conspirators was responsible for it.

5. Although the trial court had instructed counsel that they were not to interrupt another attorney's argument to the jury even if they thought the attorney was "misquoting the evidence" [R. T. 6816], the trial court not only did just that when Carbo's counsel was arguing, but it implied, without saying so expressly, and doubtless without intending, that a defendant's testimony upon which petitioner's counsel was properly relying [R. T. 6209], was not to be believed.

The following colloquy occurred:

R. T. 7283:

"Mr. Beirne: (Carbo) lived in Miami, Florida, and, made his home there for ten years. . . .

The Court: Mr. Beirne, what evidence is there in the record that he lived in Miami, Florida and made his home there for ten years?

Mr. Beirne: Mr. Palermo testified to that."

R. T. 7284:

"The Court: You are drawing on the testimony of Palermo?"

Thus, the court implied that Palermo's testimony was not to be believed.

This is a further example of the unfair treatment petitioner received. (*Cf., DeHaven v. Caulfield,* 314 F. 2d 268 [CA DC 1963]).

6. The instructions given by the court [R. T. 7634-7739] were such as to unduly impress the jury with a duty to convict or to find the defendants guilty. Nowhere in the instructions was the jury charged as to its duty to acquit or to find the defendants not

guilty. Indeed, an examination of the instructions shows that these words were carefully eschewed. A failure to instruct as to the duty acquit, in and of itself, has been held to be reversible error (*McKenzie v. United States*, 126 F. 2d 533, 537 [CA DC 1942]).

Moreover, the instructions advised the jury of the possibility of appeal and of correction if the trial court had made an error [R. T. 7635]. This type of instruction has likewise been held to be reversible error (*United States v. Fio Rito*, 300 F. 2d 424 [CA 7 1963]). And so, again, the unfairness to petitioner is manifest.

7. While Leonard was testifying, the trial court, first, on the theory that a witness, Stanley, who had previously testified, was "alleged to be one of the conspirators" [R. T. 6363], which he was not, and then under the misapprehension that Leonard was testifying as to a conversation he had had with Daly [R. T. 6366] (when, as a matter of fact, the purported conversation was with Stanley), all outside the presence of any defendant, the trial court permitted Leonard to testify as to what Stanley, not Daly, had said to Leonard of a man, Calla, who was in the hallway away from where Stanley and Leonard were talking. In response to a question by Leonard as to who the man was [R. T. 6362], the court allowed Leonard to testify [R. T. 6367]: "He (Stanley) said that Mr. Calla had been in the penitentiary for murder and I said, 'Murder?' He said, Yes he beat them to death. He was a strong-arm man."

This was inexcusable. With this kind of "evidence" permitted to be considered by the jury, petitioner was effectively prevented from having a fair trial.

Conclusion.

The petition for writ of certiorari should be granted and the judgments reversed.

Respectfully submitted.

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Paul John Carbo, Frank Palermo, Joseph Sica, Louis Tom Dragna, and Truman K. Gibson, Jr., Appellants, vs. United States of America, Appellee. No. 17,762. Feb. 13, 1963.

Upon Appeal from the United States District Court, for the Southern District of California, Central Division.

Before: Barnes, Hamlin and Merrill, Circuit Judges.

Merrill, Circuit Judge.

Appellants stand convicted of extortion affecting commerce and conspiracy to extort in violation of 18 U.S.C. § 1951, commonly known as the Hobbs Act,[1] of the interstate transmission of threats and conspiracy

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[1] "(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

to transmit in violation of 18 U.S.C. § 875(b),[2] and of conspiracy to commit an offense against the United States under 18 U.S.C. § 371.[3] They were variously charged in ten counts of an indictment by the Grand Jury of the Southern District of California, Central Division. On May 30, 1961, following trial, they were found guilty by jury verdict and on December 2, 1961, were duly sentenced. They have appealed from their several judgments of conviction.

The case involves in general the business of professional boxing and fight promotion and, more specifically, the efforts of appellants to secure managerial control of Don Jordan, a welterweight fighter, by bringing pressure to bear on his manager, Donald Nesseth. These efforts were prompted, according to the theory of the United States as expressed in its brief, by the fact that "* * * 'control' of champions and top contenders was the only significant profit factor in the operation of the boxing business. The evidence shows that 'control' was effected and maintained through matching controlled fighers with one another and that the technique for obtaining this control was to capture the fight manager through use of economic and, as a last resort, physical coercion."

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[2] "(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

[3] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Since the contentions on appeal relate importantly to the sufficiency of the evidence, the facts must be dealt with at some length.

THE FACTUAL BACKGROUND

The matching of controlled fighters has already been considered by the federal courts in proceedings brought against the International Boxing Clubs of New York and Illinois for violation of the Sherman Act. International Boxing Clubs vs. United States, 1959, 358 U.S. 242, affirming United States vs. International Boxing Clubs, S.D.N.Y., 1957, 150 F.Supp. 397. Since these proceedings figure directly in the background of the case at bar, a reference to the facts there established is helpful. The Supreme Court, at pages 245-246 recites:

> "The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtainining from each of the four leading contenders exclusive promotion rights including rights to radio, television and movie revenues. Upon securing these exclusive contracts Louis assigned them to the appellant International Boxing Club, Illinois * * *."

The opinion then recites that Norris and Wirtz organized the International Boxing Club of New York and for it acquired control of Madison Square Garden and entered into other contracts. The opinion then states, at pages 247-248:

"This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, i.e., heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the 'key' arenas and stadia in the Nation.

* * *

"The effect of the conspiracy is obvious. Using the facilities of I.B.C., Illinois, and I.B.C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, i.e., to sign with appellants or not to fight."

Later, at page 254, the opinion states:

"This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world."

By the decree Norris and Wirtz were directed to divest themselves of their stock holdings in Madison Square Garden. The boxing clubs were ordered dissolved. All exclusive agreements for the promotion of boxing events were banned.

Appellant Truman Gibson, a Chicago attorney, represented Joe Louis in 1949 at the outset of the sequence of events described in the Supreme Court opinion and from their inception was active in the affairs of the International Boxing Clubs. In 1958 he was made president of both clubs. It is the government's position that as antitrust pressure was applied to the clubs they ceased their practice of requiring that exclusive management be granted to the clubs; that the practice of securing exclusive management agreements was continued by Appellants Carbo and Palermo and that Appellant Gibson, with full knowledge of Carbo's practices and methods of operation, continued, through his dealings with Carbo and for their mutual advantage to match Carbo-controlled fighters.

Carbo, with a background of underworld association, emerges as the leader of the conspirators. Gibson's first contact with him came shortly after the boxing clubs were organized sometime in 1950. From time to time between 1954 and 1957, Gibson caused payments amounting to approximately $40,000.00 to be made to Carbo by the boxing clubs through the device of placing Carbo's wife, Viola Masters, on the clubs' payrolls for fictitious employment. Payment was explained by Gibson as being for the purpose of securing Carbo's good will and of preventing fighters or managers with whom Carbo had "influence" from becoming antagonized or alienated. In investigations conducted by the United States Senate, Gibson had explained why Carbo's wife had been employed rather than Carbo himself: "Because it looked a little bit better on our records, not ever considering the possibility of being called before a senate investigative committee, to have Viola Masters down

instead of Frank Carbo." Both before the Senate committee and in trial below, Gibson acknowledged that in their operations the boxing clubs had had dealings with the underworld. This practice was resorted to in order "to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements." Gibson testified that the boxing clubs would use "everyone" they could to prevent fixed fights and that in "everyone" he included the underworld. On redirect examination Gibson was asked whether it was "the policy of the International Boxing Club or any other organization with which you were connected in the fight business to use force or violence or threats of force and violence * * *" to which Gibson replied "No indeed." On re-cross-examination he was asked: "Of course, Mr. Gibson, when you used various people to achieve your ends you didn't know what those other people were doing on your behalf, did you." To which Gibson answered: "Not completely, no."

The district court judgment in the antitrust action was rendered in March, 1957. Commencing in the summer of 1958 Gibson sought to extend the influence of the boxing clubs to the west coast. At that time there were two exhibition halls in Los Angeles suitable for the staging of boxing contests: the Hollywood Legion Stadium and the Olympic Auditorium. Gibson moved to secure control of both.

At this time he was in charge of promoting weekly the two nationally televised boxing contests: Wednesday night on ABC and Friday night on NBC. At least $180,000.00 a week was received by the boxing clubs in connection with these promotions. The possibil-

ity of sharing in the television profits provided an incentive to deal with Gibson. A new organization known as the "Hollywood Boxing and Wrestling Club" was established by Gibson and his associates to lease the Hollywood Legion Stadium. The International Boxing Clubs lent $28,000.00 to this organization to commence operation. Named as president of the new organization and acting as its promoter and matchmaker was Leonard Blakely, known professionally (and hereinafter referred to) as "Jackie Leonard." Leonard's vulnerability to economic pressure from Gibson is apparent. Not only was his club indebted to Gibson's organizations but his future was largely dependent on Gibson's good will with respect to participation in the televising of contests.

In the fall of 1951, Virgil Akins, a Carbo-controlled fighter, was welterweight champion. A promising contender was Don Jordan, who was managed by Donald Nesseth. Nesseth had been making repeated efforts to obtain fights for Jordan on national television and had enlisted Leonard's support in this respect. With Gibson's assistance Leonard secured one such fight at the Legion Stadium with the fighter then ranked as the number one contender in the welterweight ranks. Jordan won this and two other televised bouts and became the leading contender for the title. A fourth match at the Olympic Auditorium in Los Angeles was arranged for October 22, 1958, and Gibson assured Nesseth that Akins, the champion, had agreed to defend his title against the winner of the bout. Jordan won.

The sequence of events which are now related are based in large part on the testimony of Jackie Leonard and in many respects are vigorously denied.

On October 23, 1958, while Nesseth, Leonard and Gibson, at the Olympic Auditorium, were discussing the anticipated championship fight between Akins and Jordan, Gibson received a telephone call from Appellant Palermo. Gibson spoke briefly and then handed the phone to Leonard, saying that "Blinky" wanted to speak to him. Palermo told Leonard, "We are in for half the fighter [fifty per cent of the manager's share] or there won't be any fight." Leonard protested that he had never heard of any such proposition before, and Palermo, upon learning that Gibson had not explained the situation, told him to talk it over with Gibson and call him back. When Leonard recounted the conversation, Nesseth flatly refused. Gibson explained that Carbo and Palermo controlled Akins and apologized for not having informed him of Palermo's demands earlier.

Gibson, Nesseth and Leonard met later in the day at Gibson's hotel for purposes of privacy and continued to discuss Palermo's demands. According to Leonard's testimony, Gibson said: "You know how Carbo and Blinky [Palermo] are * * *. They want all of everything before you can get a welterweight title fight * * * [but] go along with it. It has been done before. That is the way the welterweight and lightweight title has been worked since Carbo and Blinky got into the picture." Gibson proposed that Nesseth should tell Palermo that he agreed, and assured Nesseth and Leonard that he, Gibson, would straighten things out later in Chicago. Nesseth refused. He feared violent retaliation if Carbo and Palermo, falsely informed that Nesseth had yielded, should later discover that he had no intention of surrendering an interest in Jordan. He testified:

"* * * we reminded Truman [Gibson] that these weren't kids that we were talking to, and that he couldn't do very much protecting from 2,500 miles away, if they decided to start playing rough, and Truman scoffed at that and said that went out with high-buttoned shoes, that there wouldn't be any of that, and not to worry, that he would straighten it out." Gibson finally persuaded Leonard to call Palermo and to tell him the arrangement was satisfactory. This Leonard did, learning from Palermo that Gibson had already advised him that everything was all right.

On December 5 Jordan defeated Akins and became the welterweight champion of the world. The fight arrangements called for a re-match if Jordan won, with Palermo's share of both fights being payable after the re-match. Jordan won the re-match.

Between these two matches, Jordan on January 22, 1959, fought a match with another fighter, Gutierrez. Leonard asked Gibson who was to pay Palermo's share of that fight and Gibson said that if necessary he would pay it himself.

After the Gutierrez fight, when the money was slow in coming, Palermo telephoned Leonard, screamed and shouted that he was being stalled and double-crossed. Leonard tried to pacify him by telling him that he had seen Gibson that day and that the money would be sent. Palermo said he didn't want to hear anything about Gibson; that he was holding Leonard and Nesseth responsible and that Leonard was expected to handle Nesseth. Carbo then took the phone from Palermo and, according to Leonard's testimony, "He said 'You son-of-a-bitching double-crosser.' He said, 'You are no

good,' and he says, 'Your word is no good. Nothing is no good about you.' He said, 'Just because you are 2,000 miles away, that is no sign I can't have you taken care of.' He said, 'I have got plenty of friends out there to take care of punks like you.' He said, 'The money had better be in.' * * * I was trying to get a word in edgewise, to tell him the money would be sent that day. He wouldn't let me say anything, he was just cursing and hollering at me and saying there would be somebody out here to take care of me, and if that money wasn't there right away somebody would be looking me up."

Leonard was badly frightened by the conversation. After hanging up he turned to Nesseth, who had been standing next to the telephone booth, and told him everything that had been said. Nesseth noticed that Leonard was "shaken up, nervous."

Leonard later, by arrangement with Gibson, sent his personal check for $1,725.00 to Claire Cori (Palermo's wife) and was reimbursed by Gibson.

During this period of time Palermo and Gibson both began to express an interest in matching Jordan with Sugar Hart, another Carbo-controlled welterweight. Nesseth was not interested. The match would be a hard one and Nesseth felt easier matches would be more profitable and less risky.

The Jordan-Akins re-match was held in St. Louis on April 24, 1959. Palermo immediately demanded his share from Nesseth. Nesseth flatly refused to pay anything and explained that he had never consented to surrender an interest in Jordan and the circumstances under which Leonard and Gibson had stated the con-

trary to Palermo. Palermo's final comment was that "'The Man' isn't going to like this." Palermo called Leonard and, according to Leonard's testimony: "He told me I would be hearing from him right away, I better do something to straighten this mess out or I was going to get into a lot of trouble with the people back East."

On April 28 Nesseth and Leonard were in Leonard's office when a call came from Carbo. Leonard testified: "* * * the voice said, 'Hello, hello, hello. You know who this is?' I says, 'Yeah, I know who this is.' And he says, 'You're a no good'—and he used some vulgar language and called me a double-crosser and told me that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead, and he called me another S.B. and different names, real bad names, 'double-crosser,' and he says, 'We are going to meet at the crossroads,' he says, 'You will never get away with it. I have had that title 25 years and no punks like you are going to take it away from me,' and he repeated that statement, he says, 'When I mean get you, you are going to be dead,' he said. 'We will have somebody out there to take care of you.'"

Nesseth testified: "What I heard from Leonard's end of the conversation, there wasn't very much conversation on his part. One or two times he stammered and said, 'You shouldn't say those things.' But the call, I would say it was very one-sided, and I did notice and observe that Leonard turned about the color of your shirt during the course of that conversation.

and when the phone call was over and he hung up the phone he sat there just for a second and he got up and ran across the hall to the ladies' room, which we used during the daytime as a men's room, and he vomited. I have never seen anybody any more shaken up than he was at that time."

A few minutes later a telephone call came from Palermo. Leonard testified: "And he said, I was a double-crosser and I was no good and he was coming to the coast and he was going to see some people and they were going to see me. And I told him there was no good to come, and I was mad, I was very mad, and I hung up on Blinky."

Later, at Leonard's home, he received another call from Palermo which he described as follows: "He wanted to know if I cooled off yet and said, 'Jesus, there is no use being like that.' He says, 'After all, maybe the guy shouldn't have called like that, but' he said he figures he had a right to, 'they have had that account a long time and you people out there are double-crossing him.' He said, 'Now, we might as well be like gentlemen and not be mad,' and he says, 'I will be out there and talk to you.' I said, 'There is no use of coming out here, I am fed up with all of you,' and I told him he would have to see Nesseth and he said, 'I can't see Nesseth unless he will sit down and talk to me.' And I said, 'You will have to take care of that, there is nothing I can do about it. Nesseth doesn't want to talk to any of you and if you want to talk with him, you will have to make your own contact with him.' With that he said, 'Well, I will be out there in a few days and we are going to look you up.'"

On April 30 Gibson, who had been notified by Leonard of the threatening calls, telephoned Leonard and offered to pump additional capital into the Hollywood Club if Leonard would persuade Nesseth to agree to a Hart fight. On the same day Palermo arrived in Chicago from the east and stayed at the Bismark Hotel (owned by Norris and Wirtz) at the expense of the Boxing Clubs. On May 1 he met with Gibson and Hart's manager in the lobby of the hotel and thereafter left for Los Angeles.

On May 2 Leonard had a telephone call from Palermo summoning him to a late night meeting at a Los Angeles hotel. He entered the hotel to find Palermo in company with Appellant Sica. Describing his reaction to Sica's presence in company with Palermo, Leonard testified: "Well, the minute I seen him I remembered what Carbo had told me before about somebody on the west coast taking care of me and for once I was scared, when I seen him. * * * Well, by reputation I had always known of Joe Sica as an underworld man and a strong-arm man."

In their conversation, according to Leonard, Sica stated: "He says, 'Look Jackie, you made a choice. It is a question of either you or Don Nesseth is going to get hurt. Wouldn't you rather go grab him by the neck and straighten him out, than for me to go back, tell "The Gray"? You try it, you are all right, but it is Nesseth that is no good.' 'The way it is now,' he says, 'you and Blinky have both got your necks in a sling,' and he said, 'Something has got to be straightened out.' He said, 'If you have to, go out and beat the hell out of Nesseth. If you need any help we will go with you and help you and drag him out of bed.'"

Also, referring to Palermo, Leonard stated: "Well, Blinky said, 'That is the only answer to the whole problem,' was for me to convince Nesseth to fight Sugar Hart and that that would straighten things out, as far as Carbo was concerned. And Sica agreed there, too. He said that I had my head in a noose and that was the only way I was going to get the thing straightened out, was to grab hold of Nesseth and make him take the fight with Sugar Hart."

The following day Nesseth called Gibson to complain of the threats that had been received. Gibson disclaimed responsibility but, according to Nesseth, "Truman said, 'Well, all the pressure can be relieved and you can also do your own Jackie Leonard a favor by saving his Club, if you will just agree to fight Sugar Hart.' And I told him they could forget that, because I had better things in mind and I wasn't going to fight Sugar Hart. We must have talked for probably 15 minutes and Truman agreed that he would call Norris and see what he could do about getting these people out of town."

On May 4, while Nesseth and Leonard were in Leonard's office, Palermo appeared and, shortly thereafter, Appellant Dragna. Nesseth immediately left the room. Palermo, in Leonard's pressence, then explained the problem to Dragna and asked what Dragna thought of it. According to Leonard: "Dragna says, 'Well, you are wrong, Jackie. You are dealing with big people and your word should be your bond.' He says, 'After all, if your word is no good, then you are no good in this game. Everything is dealt—you are dealing with real nice people and big people, and if your word is no good you are no good in this game.'"

Dragna inquired about Nesseth; whether he did not live out his way in West Covina and again whether he did not have a wife and child. Later, according to Leonard, Palermo stated: " 'Well, we have to make this Hart fight. At least, if I can go back and tell "The Old Man" '—meaning Frank Carbo—'tell him I have the Hart fight, that will take a lot of pressure off. I can tell him you tried and I tried and at least we have something accomplished.' He said, 'I am going to leave,' and he said, 'I want you to make sure things are taken care of.' Dragna told me, he says, 'You are right in the middle of this thing, Jack.' And he said, 'You better try to get it straightened out or,' he says, 'you can be in a lot of trouble.' "

As with Sica, Leonard understood that Dragna was connected with the underworld and associated his appearance with Carbo's threat. Nesseth also testified that he understood both Sica and Dragna were connected with the underworld. Dragna's appearance so upset him that he immediately sought and obtained police protection.

On May 5 an induction coil connected with a tape recording machine was placed beside Leonard's home telephone, with his consent, by the Los Angeles Police, and his office was equipped with a concealed microphone.

The following day Sica and Palermo called on Leonard and Nesseth at Leonard's office in an effort to persuade Nesseth to agree to a fight with Sugar Hart. The visitors received no satisfaction. As Sica was leaving, he leaned over Leonard and, according to Leonard, whispered in his ear: "Jackie, you are it." Nesseth con-

firmed that Sica had whispered in Leonard's ear as he was leaving.

On May. 7, in telephone conversation with Gibson, Leonard had reported that Nesseth was still refusing a fight with Hart. Gibson stated, "Well, it's too bad. I could have saved the club if I could have made that fight."

On May 11, Gibson flew to Los Angeles with William Daly, named as an unindicted co-conspirator. Leonard was out of town and was telephoned by Gibson, who advised that he had to return to Chicago but was leaving Daly there to talk to Leonard.

On May 13, after Leonard had returned, Daly called on him at his office. He wanted to know what Leonard was going to do about the money owed to Gibson. He said Leonard was in "hell of a jam" both regarding his club's financial obligations and regarding Nesseth. He said: "Carbo is really boiling." He told Leonard to call and see him at his hotel the next day.

The following day Leonard was equipped by the police with a Minifon wire recording device and also with a portable transmitting device. He then called on Daly. A lengthy conversation ensued, all of it taped.

According to Daly, Gibson was upset, saying he was in "a jackpot" because he had allowed the title to get out of "their" hands. He had accused Leonard and Nesseth of trying to destroy him, and had stated that instead "I'll have them destroyed." There was a discussion of a near fatal assault on Ray Arcel, a Carbo-controlled manager who had asserted his independence. Daly explained the technique of assault:

"See what they do. They use a water pipe, see, You know, regular lead water pipe. Lead pipe. And about that short. About that thick. And they just get an ordinary piece of newspaper, see, newspaper don't show fingerprints. Then they take it and they wrap it just in the newspaper, see— * * * Just an ordinary piece of paper, that's all they ever use. And you sitting in a crowd. And they try to give you two bats, and they kill you with two if they can. But they whack you twice and split your—fracture your skull, and knock you unconscious, and they just drop it, they can't—there's no heat. You can't—you haven't got no weapon on you. If they said you did it, what the hell, you drop it in a crowd or out in the street. They drop it immediately. After they do it they drop it. And after they drop it—the law—they're protected by the law. They have to have witnesses. They seen them come out and that's the guy, and that's what he used." And later: "They used a couple kids from Boston to do it." Leonard: "They always use professionals, guys from out of town." Daly: "Yeah, they were kids." Leonard: "Like here, if they wanted Don and I, they're not going to use somebody that we know around here." Daly: "No. The Sicas would be home."

Leonard inquired as to why Sica was becoming involved in something not his business. Daly replied: "Well then, people in New York do them favors," and later: "I don't know what way they're going to handle that Nesseth, but they are going to handle him some * * * way." Daly complained of having to stay in Los Angeles. "I got a lot of things home to try to straighten out. But Truman says, 'Wait 'til Monday.' He's coming in Monday. What'll happen Monday, Jack?"

Leonard explained how he hoped to get financial aid for his club from a San Francisco promoter, Don Chargin, and stated that now Sica wanted to see Chargin. Daly stated: "Oh, they'll get somebody up around San Francisco to go see him, and tell him to lay off you people. * * * You know. So it'll make the guy think a little bit, too, you know."

On June 4 Chargin was planning a trip from San Francisco to Los Angeles in connection with his negotiations with Leonard to take over the failing Hollywood Boxing and Wrestling Club. He received an anonymous telephone call as to which he testified: "The call stated to stay out of Hollywood and that they knew my flight number and also that 'you saw what happened to Jack Leonard' * * *." Leonard had received a beating and had been hospitalized.

In September, 1959, Leonard's club failed and went into bankruptcy. Since Leonard could no longer obtain nationally known fighters, he quit the boxing business.

Also in September the indictment against these appellants was returned.

The indictment contained ten counts. Two of the counts charged all of the appellants (together with unindicted co-conspirator William Daly) with conspiracy: Count 1 with a conspiracy to commit extortion;[4] Count

[4]Paragraph 3 of this count reads as follows:

"The objects of such conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches be-

5 with a conspiracy to transmit threats by means of interstate communications.

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ing nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

"c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

"d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize-fighter Don Jordan."

[5]Paragraph 3 of this count reads as follows:

"The objects of said conspiracy were to be accomplished as follows:

"a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

"b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth and Leonard Blakely without payment of considerations for the monies and control so received."

Subparagraphs c. and d. are substantially the same as those set forth in footnote 1 as to Count 1.

In eight counts Appellants Carbo, Palermo and Sica were charged with substantive offenses. Carbo and Palermo were charged in Counts 3 and 2, respectively, with obtaining the sum of $1,725.00 from Leonard through threats of physical injury and violence. Palermo and Sica, in Count 4, were charged with attempts to coerce Nesseth through fear and threats of violence into giving up part of his contractual control of Jordan by signing a match with Sugar Hart. Carbo and Palermo, in Counts 6, 7, 8, 9 and 10, were charged with the interstate transmission of threats to injure Leonard and Nesseth.

By jury verdict all defendants were found guilty as charged. The following sentences were imposed:

Carbo: Imprisonment consecutively for twenty years on Count 1 and five years on Count 3, a total of twenty-five years, plus a fine $10,000.00.[6]

Palermo: Imprisonment for fifteen years on Count 1, plus a fine of $10,000.00.[7]

Sica: Imprisonment for twenty years on Count 1, plus a fine of $10,000.00.[8]

Dragna: Imprisonment on Counts 1 and 5 for five years each to run concurrently.

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[6]On Counts 5, 7 and 9, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the twenty-five years imposed for Counts 1 and 3.

[7]On Counts 2, 4 and 5, imprisonment consecutively for five years, a total of fifteen years, was made to run concurrently with the fifteen years imposed for Count 1. Likewise, imprisonment consecutively for five years each on Counts 6, 8 and 10, a total of fifteen years, was made to run concurrently.

[8]A sentence of five years on Counts 4 and 5 was made to run concurrently.

Gibson: Imprisonment on Counts 1 and 5 for five years each to run concurrently, plus a fine of $10,000.00. Imprisonment was then suspended and Gibson was placed on probation for a period of five years.

SUFFICIENCY OF THE INDICTMENTS

Appellants make several attacks on the indictments. First, it is contended that Counts 1 through 4 failed to allege offenses cognizable in the federal courts because there is no sufficient showing that the extortion charged affected commerce. It is asserted that neither a contract between one fighter and his manager nor a share of the fighter's purse constitutes commerce.

Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion "in any way or degree." The quantum of effect under the Hobbs Act is thus entirely different from that required under the Sherman Act.[9]

This is clearly pointed out in United States vs. Malinsky, S.DN.Y., 1956, 19 F.R.D. 426, 428, denying a motion to dismiss an indictment for failure to allege with sufficient particularity the manner in which the claimed extortion affected commerce. There it was stated:

> "Whereas under that Act it may be that a court must find that the acts complained of have a direct and substantial effect on interstate commerce, under the subject statute there is no need for such

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[9]See Hulahan vs. United States, 8 Cir., 1954, 214 F. 2d 441, 445; cert. den., 348 U. S. 856 (1954).

a finding. The statute provides that effect in 'any way or degree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial. The substantiality of the effect is not left to judicial determination. * * * Congress quite understandably might prohibit extortion or conspiracies based on extortion which affect interstate commerce in any degree. Their corrosive quality is not likely to be subject to quantitative measurement to the same extent as the economic effect of combinations in restraint of trade."

In United States vs. International Boxing Club, 1954, 348 U.S. 236, it was held that the business of promotion of professional championship boxing contests and the selling of rights to televise, broadcast and film such contests for interstate transmission constituted commerce within the Sherman Act.

Here it can hardly be denied that such commerce is affected in some degree by extortion to obtain control of a champion fighter. A sufficient effect on commerce under the Hobbs Act has then been charged.

Further attacking the sufficiency of Counts 1 through 4 to charge a federal offense, appellants contend that the Hobbs Act is vague and uncertain in its application to the boxing business, and may not constitutionally be applied to the charged acts of extortion.

Undeniably the act was particularly aimed at labor racketeering, but by its terms it is not so limited.[10]

[10]The legislative history of the bill indicates that while most of the drafting problems presented by the bill related to its

Racketeering in other areas is clearly included. The language of the statute provides fair warning and adequate notice that extortion in any area is included so long as the necessary effect upon commerce results.

It is contended that Counts 1 and 5 fail to meet the requirement of Rule 7(c), F.R.Cr.P., that they provide "a plain, concise and definite statement of the essential facts constituting the offense charged." It is asserted that they do not allege how interstate commerce was to be delayed, obstructed or affected by the charged conspiracy; or how the threats charged could yield control of Jordan or a share of his purse; or what agency of interstate commerce was to be used to convey the alleged threats; or between what points these threats were to be communicated.

It is not necessary to plead such evidentiary detail.[11] Subparagraph 3 of each count clearly alleged the scheme for accomplishing the criminal goals of the conspiracy, including reference to the role each of the five defendants was to play in the attainment of these goals. This is sufficient.[12]

It is also contended that the substantive counts relating to the threatening communications did not charge offenses since they failed to contain any allegation determining venue.

Rule 7(c) does not require venue to be pleaded. Since it is waivable,[13] it is not an essential fact constituting

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coverage of labor activities, the bill was broadly conceived as of part of a legislative plan to deter professional gangsterism. S. Rep. No. 1440, 73d Congress, 2d Session.

[11]Wong Tai vs. United States, 1927, 273 U. S. 77.

[12]Schino vs. United States, 9 Cir., 1954, 209 F. 2d 67, 69, cert. den., 1954, 347 U. S. 937.

[13]Rodd vs. United States, 9 Cir., 1948, 165 F. 2d 54.

the offense charged.[14] Defendants have the right to be tried in the proper forum, not the right to be charged with the proper venue.[15]

In this case a bill of particulars giving full details respecting venue was filed one month after the indictment was returned. There was then no possibility of prejudicial surprise.[16]

The contention that § 1951 is not within the power of Congress and contravenes the Tenth Amendment was refuted in Nick vs. United States, 8 Cir., 1941, 122 F. 2d 660, cert. den., 314 U.S. 687, reh. den., 314 U.S. 715, reh. den., 316 U.S. 710 (1942). The conspiracy and substantive offenses under § 1951 do not merge.[17] Nor is the § 371 conspiracy identical with the § 1951 conspiracy.

We conclude that in all respects of which the appellants complain, the indictments sufficiently charge the federal offenses to which they were directed.

SUFFICIENCY OF THE EVIDENCE

All defendants assert a lack of substantial evidence of guilt upon all counts in which they were charged. Our discussion of this contention is, of course, subject to our later discussion of other assignments of error in which attack is made upon specific portions of the record.

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[14]See Rule 12(b)(2), F.R.Cr.P.

[15]Suggestions by Carbo and Gibson that they were not tried in the proper state and district are not open to consideration since no motion for change of venue under Rule 21(b) was made below.

[16]Compare, Bratton vs. United States, 10 Cir., 1934, 73 F. 2d 795.

[17]Callanan vs. United States, 1961, 364 U. S. 587.

Accepting the facts and the testimony as we have recited them, the contentions of Garbo, Palermo and Sica may be summarily dismissed as to the substantive counts. Their contentions are founded in large part upon an attack on the credibility of Leonard. We shall not disturb the jury's determination in this respect.

Likewise, as to the Count 1 conspiracy the evidence is amply sufficient as to these three appellants. Their active and joint participation in overt acts which themselves constituted substantive offenses leaves little doubt but that they knowingly acted in concert and pursuant to plan.

Likewise, as to the Count 5 conspiracy there can be no doubt but that Carbo and Palermo knowingly acted in concert and pursuant to plan.

As to the Count 5 conspiracy there is no evidence that Sica and Dragna entered the plot before the interstate threats had been communicated and the conspiracy fully consummated. We find no evidence that they had any knowledge of the plot at the time of the interstate threats nor anything from which an inference of conspiratorial association or agreement at that time might be inferred. The jury's verdict upon Count 5 should have been set aside as to these appellants. As to Appellant Sica the court's failure to do this is without prejudice in the light of his twenty-year sentence imposed for Count 1 and the concurrent five-year sentence upon Count 4.[18]

As to Appellant Dragna, after careful consideration of the record we have concluded that there is no suf-

[18] See Hirabayashi vs. United States, 1943, 320 U. S. 81.

ficient evidence to hold him guilty upon Count 1. The only evidence is as to the occasion on May 4, 1959, which we have recounted, when Dragna appeared with Palermo and talked to Leonard (plus evidence that Dragna and Palermo had been seen together a day or so earlier). On this occasion Dragna was simply asked what he thought and gave his opinion. Leonard, in testifying before the California Athletic Commission, described Dragna's participation as follows: "He didn't say anything, no threats. No—in fact, he was a very good gentleman there. He did very little talking. Listened."

There was nothing said which would suggest that Dragna was an interested party. There was nothing other than his presence with Palermo which could give rise to any sinister implications that he was lending his active support to a program of violence. The United States suggests that those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or a threat of violence. We cannot agree. Leonard may have been wholly justified in the conclusions he drew, but it does not follow that Dragna may be held criminally responsible for those conclusions.

As to Appellant Dragna the district court must be reversed and the sentence set aside.

As to Appellant Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jor-

dan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect and it is clear that the evidence is sufficient to connect him with this underlying conspiracy. (2) The *charged* conspiracies to accomplish the underlying purpose by extortion and threatening communications.

The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies.

The United States further emphasizes the fact that Gibson himself was guilty of acts of economic coercion in making it clear on at least two occasions that should Jordan sign with Sugar Hart Leonard's economic difficulties would be over, but that unless such a fight took place Gibson would be unable to save the Hollywood Boxing and Wrestling Club.

There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats. In our view it does through proof of Gibson's connection with Daly.

Gibson brought Daly to Los Angeles in order to confer with Leonard and delegated Daly to act as his representative in discussions with Leonard. Gibson advised Leonard to this effect. One may logically con-

clude that in what Daly said, he spoke for Gibson and what he said related to Carbo and Palermo and was calculated to freighten Leonard into renewed efforts with Nesseth.

Accordingly, we conclude, subject to later discussion of specific points, that while judgment must be reversed as to Appellant Dragna the evidence is sufficient to support the jury verdict as to Appellants Carbo, Palermo and Gibson and, as to Appellant Sica, the verdict on Counts 1 and 4.

DECLARATIONS OF CO-CONSPIRATORS

A substantial part of the proof on the conspiracy counts consisted in what various of the co-conspirators out of court had said about their fellow conspirators. All appellants have most vigorously protested the admission of such declarations as hearsay and have contended that the district court failed adequately to instruct the jury respecting the conditions under which such declarations may be used against conspirators other than the declarant.

It is well established that the declarations of one conspirator in furtherance of the objects of the conspiracy, made to a third party, are admissible against his co-conspirators.[19]

It is also well established, however, that such declarations are admissible, over the objection of a co-conspirator who was not present when they were made, only if there is proof independent of the declaration that he is connected with the conspiracy. Glasser vs. United States, 1942, 315 U. S. 60, 75: "Otherwise

[19]Logan vs. United States, 1892, 144 U. S. 263, 309.

hearsay would lift itself by its own bootstraps to the level of competent evidence."

The following instruction was offered and was rejected:[20]

> "You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to him.

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[20]The district court in its charge to the jury did deal with the substance of this instruction as to Appellant Gibson. It charges:

"You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy."

Also, in admitting certain declarations of Appellant Palermo, the court stated:

"I will tell the jury that, of course, when any one of a group of conspirators makes a statement in furtherance of the purpose of the conspiracy, that is binding on all the conspirators. But that rule only applies if there are co-conspirators.

"Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator."

"A defendant's connection with a conspiracy must be established beyond a reasonable doubt, accordingly, by his own conduct and his own statements or declarations."

We cannot accept appellants' view of the law as set forth in the proposed instructions. The declarations, as to defendants other than the declarant, constitute hearsay. Yet with a proper foundation they would qualify under the well recognized exception which permits the introduction of declarations of a co-conspirator.[21] The problem of co-conspiratorial declarations, then, is one of the admissibility of evidence under a well recognized exception to the hearsay rule. It is not a substantive question as to the qualitative sufficiency of the evidence necessary to prove the existence of a conspiracy.[22]

The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant

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[21]The necessary foundation consists of three distinct prerequisites. First: that the declaration is in furtherance of the conspiracy; second: that it was made during the pendency of the conspiracy; third: that there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it. See authority, infra, footnote 22; Uniform Rules of Evidence, 63(9); Model Code of Evidence, Rule 508(b). Only the third element is controverted here, save as may hereafter be discussed.

[22]See: 4 Wigmore, Evidence (3d Ed., 1940) §1079; see generally: Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 984-989 (1959); Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954).

In analyzing this question, every case that has come to our attention has done so from the point of view of whether the declarations were "admissible" or "competent" evidence. Most recently in Wong Sun vs. United States, 1963, ... U. S. ....., ..., the Supreme Court has recognized that "the rule which regulates the use of out-of-court statements is one of admissibility, rather than simply of weight, of the evidence."

but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits.[23] The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law, as set forth in the proposed instructions, is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.

Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declarations at all. The district court in effect will have told the jury, "You may not consider this evidence unless you first find the defendant guilty."

The point is made in United States vs. Dennis, 2 Cir., 1950, 183 F. 2d 201, 230-231, affirmed 1951, 341 U. S. 491, where it is stated:

> "It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what

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[23]See discussion, Maguire and Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 1927, 40 Harv. L. Rev. 392, 415.

the jury had already decided. In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all."

In Rowley vs. Braly, 1926, Texas Civil Appeals, 286 S. W. 241, 245, the same thought is expressed:

"If the conspiracy is established, then what purpose can the declarations and statements introduced in evidence serve? * * * If this [rule giving the determination to the judge] is not correct, of what avail would the proof of such declarations be to the party offering them."

Finally, Maguire and Epstein, supra footnote 23, at page 407 (their footnote 47), agree that:

"If the other evidence satisfies the jury that the conspiracy has been entered into, the co-conspirator's declarations can fulfull no useful function."

We find the quoted authorities persuasive. To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.

The rule of law for which appellants contend would then, effectively condemn this entire exception to the hearsay rule. This result we must reject.

Nor could this exception be rescued by giving the preliminary question to the jury to be decided by it upon the basis of a prima facie case rather than proof beyond a reasonable doubt. The jury is already concerned with the evidence-weighing standards involved

in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence-weighing standards required of a prima facie case, is to expect the impossible. As stated in Dennis, supra at page 231;

> "Indeed it is a practical impossibility for laymen and for that matter for most judges to keep their minds in the isolated compartments that this requires."

Indeed, the injection of the standards of a prima facie case into a jury determination (even though carefully isolated, by instructions, from the ultimate determination of guilt) might very well be found to cause confusion as to standards of proof highly prejudicial to the defendant.

Therefore, we adopt in this situation the orthodox prevailing view of the allocation of functions between judge and jury, which assigns to the judge decisions upon preliminary questions of fact determinative of the admissibility of evidence challenged under technical evidentiary rules.[24]

Our position is supported by language in United States vs. Dennis, supra at page 231:

> "The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the

[24]See Maguire and Epstein, supra.

> competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent."

It is for the judge then, and not the jury, to determine the admissibility of the declarations. In making this determination the test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made. Thereafter it is the jury's function to determine whether the evidence, including the declarations, is credible and convincing beyond a reasonable doubt.

The trial judge's finding on admissibility in no way restricts the jury's inquiry into guilt or innocence. As stated in United States v. Dennis, supra at page 231, quoting from United States v. Pugliesi, 2 Cir., 1945, 153 F. 2d 497, 500:

> "'The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliesi and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt.' No doubt, this conclusion permits the jury to act upon hearsay, because

> they may be satisfied of the 'joint undertaking' only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question."

It must be conceded that in many cases instructions such as that proposed by appellants have been held proper. We know of no case save one,[25] however, in which the failure to give such an instruction has been held error. Cases cited by appellant as holding to this effect we find distinguishable.[26]

Appellants assert that there was a lack of a prima facie case made out by independent evidence and that the declarations were inadmissible for this reason. We cannot agree. There was ample as to each appellant, as the district court on motion for new trial noted.

We conclude that it was not error to admit against the appellants the declarations of their co-conspirators, nor to fail to give the requested instruction.

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[25]In Schmeller vs. United States, 6 Cir., 1944, 143 F. 2d 544, hearsay documents had been admitted in absence of an establishment of a prima facie case by independent evidence. The court agreed with defendants that the jury should not rightly have considered the hearsay evidence, but instead of noting error in the judge's failure to remove the evidence from jury consideration by an erasure instruction when the necessary showing had not been made, the court placed the blame on the judge's failure to instruct the jury to try the admissibility point for themselves. We cannot agree with this solution. When no prima facie case is made out, the rights of the defendants can hardly be protected by permitting the jury to find that the evidence was nonetheless admissible.

[26]Lutwak vs. United States, 1953, 344 U. S. 601, dealt with declarations not in furtherance of the conspiracy, which, it is well recognized, are limited in their application to the declarer alone. Oras vs. United States, 9 Cir., 1933, 67 F. 2d 463, where an instruction was held erroneous, involved lack of a prima facie case aliunde the declaration.

ELECTRONIC RECORDINGS AS EVIDENCE

Three electronic recordings of conversation were received in evidence over appellants' objection.

The Daly-Leonard conversation on May 14, 1959, was recorded by two independent methods. Leonard was equipped with a Minifon, a miniature wire recording device. The wire recording made on Leonard's person by this method was received in evidence. Leonard also was equipped with a miniature radio transmitter. The conversation was picked up in a neighboring room through a radio receiver and was there recorded on tape.

Appellants contend that these exhibits were inadmissible since they were secured in violation of the Fourth Amendment. They assert that Leonard obtained access to Daly's room under false pretenses amounting to an unlawful search and seizure.

We have held to the contrary upon this point in Todisco vs. United States, 9 Cir., 1961, 298 F. 2d 208, cert. den., 1962, 368 U. S. 989. Appellants request us to re-examine our decision in that case and overule it. We decline and adhere to our opinion as there expressed.[27]

Appellants further claim that these exhibits were inadmissible because secured contrary to 47 U. S. C., §301, which provides that "no person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * * except

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[27]Accordingly, we find it unnecessary to discuss the question of whether these appellants have standing to assert a violation of Daly's constitutional rights.

* * *: with a license in that behalf * * *." Although Leonard had no license, "no policy against admission of evidence secured by the radio operation can be said to arise from such lack." Todisco vs. United States, supra at page 211.

On May 5, 1959, Palermo telephoned Leonard at his home and attempted to persuade him to come to a restaurant where Palermo and Sica were waiting for him. Palermo told Leonard that he had been contacted by Carbo and that he and Leonard had to place a call to Gibson. This conversation with Palermo was recorded by Leonard with the aid of a Los Angeles police officer through an induction coil placed beside Leonard's home telephone.

Appellants contend that this recording was inadmissible in evidence since it constituted a violation of 47 U. S. C. §605.[28] We disagree.

In Rathbun vs. United States, 1957, 355 U. S. 107, it was held that the contents of a conversation overheard on a regularly used telephone extension with the consent of one party to the conversation did not constitute an unauthorized interception.

Appellants would distinguish Rathbun upon the ground that use of an induction coil constitutes, me-

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[28] ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person . . . and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purpose, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

chanically, a physical interception which is not the case with a regularly used extension phone. Again we disagree. As the record demonstrates, the induction coil is placed against the side of the telephone instrument where it serves as a listening device much in the nature of a tuning fork. There is no physical connection with or interruption of the telephone electrical circuit.[29]

But further, we do not understand that the mechanical nature of the method of overhearing is now to be guidepost in this area. The controlling principles, it would seem, are substantially the same as those which guided us in Todisco.

In Rathbun, at page 110, it is stated:

> "The clear inference [from the language of §605] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."

[29] Appellants further suggest that use of the induction coil violates some regulation of the Federal Communications Commission. No objection on this basis was made at trial and we are not referred to the regulation in question.

We find no distinction between holding out the handset and permitting an outsider to hear through the use of an induction coil.[30]

Nor does the recording of this legally overheard conversation render the overhearing and divulging of the conversation improper.[31]

We conclude that it was not error to receive these recordings in evidence.

SICA'S UNDERWORLD REPUTATION

Sica moved to dismiss the indictment against him (Counts 1 and 5) for the reason that he was unduly prejudiced by the charge in Paragraph 3(c) (see footnotes 4 and 5) that the conspiracy contemplated the use of "persons known to said victim to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence" and the enlistment of Sica for this purpose. The motion was denied. Sica also objected to the introduction of testimony by Leonard and Nesseth to the effect that by reputation they knew of Sica as an "underworld" man and a "strong-arm" man. The objection was overruled. Sica assigns error in these respects.

In discussing the admissibility of evidence of bad moral character the Supreme Court in Michelson vs. United States, 1948, 335 U. S. 469, 475, states:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort

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[30]See Ferguson vs. United States, 10 Cir., 1962, 307 F. 2d 787; Carnes vs. United States, 5 Cir., 1962, 295 F. 2d 598, cert. den., 1962, 369 U. S. 861.

[31]Carnes vs. United States, supra, at page 602; see also Hall vs. United States, 5 Cir., 1962, 308 F. 2d 266, cert. den., 1963.

by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer vs. United States, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[32]

The subjects of confusion of issues and unfair surprise will be discussed later.

Whether in this case prejudice was undue would seem to us to depend upon the purpose served by the charge, and the issue to which the prejudicial evidence was relevant, and a consideration of the probability of harm to the defendant in the light of these facts.

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[32]See also: 1 Wigmore, Evidence, 3d Ed., 1940, §§55, 57; Uniform Rules of Evidence, Rule 47; Model Code of Evidence, Rule 306(1).

The nature of Sica's reputation was not introduced into the case for the purpose of characterizing him as a bad man likely to resort to the conduct with which he is charged. This was not the source of its relevance.

Instead the prosecution relied on the reputation of Sica as a probative fact enabling the jury to infer that Sica had intervened with Leonard and Nesseth knowing that his presence would instill fear in them and intending to manipulate this fear for the benefit of Carbo and Palermo; and further, to conclude that Carbo and Palermo had secured Sica's participation with full realization that his effectiveness was based upon the fear his reputation could inspire in the victims.

In cases of extortion based upon fear of violence the facts of fear, actual or anticipated, and of its reasonableness, are vital factors. To prove a substantive act of extortion it is essential to show the generation of fear in the victim.[33] To prove a substantive act of attempted extortion it is necessary to prove an attempt to instill fear. To prove a conspiracy to extort it is necessary to show a plan to instill fear.

Here Sica stood in the position of a dangerous weapon to be used to strike fear into the hearts of Leonard and Nesseth. It was part of the prosecution's case to charge and to prove that the conspirators considered Sica to occupy this position. That Leonard and Nesseth

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[33]Bianchi vs. United States, 8 Cir., 1955, 219 F. 2d 182, 188-190, cert. den., 349 U. S. 915, rehearing den., 349 U. S. 969; Nick vs. United States, 8 Cir., 1941, 122 F. 2d 660, 671, cert. den., 314 U. S. 687, rehearing den., 314 U. S. 715, reh. den., 316 U. S. 710. See United States vs. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U. S. 867, rehearing den., 325 U. S. 892.

considered him to be dangerous and that fear reasonably resulted from his appearance because of his reputation constituted relevant facts upon this part of the prosecution's case. "* * * there is a rational connection between the existence of the criminal agreement —'the partnership in crime'—and the fact that the acts upon which the conspirators agreed, when carried out, had the expected effect upon those against whom they were directed * * *." United States vs. Compagna, 2 Cir., 1944, 146 F. 2d 524, 528, cert. den., 324 U. S. 867 (1945), reh. den., 325 U. S. 892 (1945).[34]

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[34]In this case Judge Learned Hand, disagreeing with the majority of the court, found the fact of fear irrelevant in a conspiracy case, although agreeing to its relevance in a case of substantive extortion. It does not appear from that case, however, that the plan of the conspirator was to instill fear in their victims. The opinion states at page 526:

> "So far as appears they did not expressly threaten violence but confined themselves to a pretense of union activity; they threatened to call strikes against their victims unless they were plentifully paid."

Judge Hand was of the view that evidence of the victim's fear of acts of violence incidental to the strike was irrelevant and inadmissible in absence of any showing that this fear was communicated to the conspirators.

Accepting that Judge Hand's minority view might have merit under the circumstances of that case, the situation appears entirely distinguishable from that at bar.

Here it is charged that fear of Sica was intended to serve as the very source of coercive power and the use of west coast enforcers had been expressly threatened. Furthermore, the victims' fearful states of mind here were fully disclosed to every one of the conspirators. Gibson from the outset knew that Leonard and Nesseth were apprehensive that Carbo and Palermo would resort to force and was requested by Leonard to intervene after Sica entered the picture. Palermo admitted knowledge that Leonard and his wife were frightened. Sica, himself, noting Leonard was taken aback by his presence, had asked Leonard whether "you feel there's some type of repercussions by me coming in here?"

It is true that (despite the precautionary steps taken by the judge as later discussed) the jury may have permitted this evidence to bear upon the probability of Sica's guilt. The question is whether this possibility renders such evidence unduly prejudicial and inadmissible. If so, the United States is precluded from establishing a material part of its case.

The question then is not whether the United States may use Sica's reputation as a sword against him, but whether he may himself make use of it as a shield to immunize himself from proof of the means by which the conspirators planned to freighten their victims into submission. If he may, then all who are known to live by violence are free to extort by the tacit threat of violence conveyed by their reputations; for the reasonableness of the resulting fear, as determined by its cause, may not be presented to the jury.

We cannot accept this result as a sound balance of the conflicting interests involved.

This, in our judgment (with such safeguards as were taken by the trial judge), is a proper case for application of what has been termed the "multiple admissibility doctrine." As stated in 1 Wigmore, Evidence (3d Ed., 1940) §13, page 300:

> "When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule."

In State vs. Beisle, 1920, 79 N. H. 444, 111 Atl. 316, 317, this doctrine was applied. There defendant Lyman was charged with assault upon a policeman. The victim, Fox, had sought to defend himself by drawing a gun. To justify this defense he was permitted to testify that Lyman was, Fox believed, a man who would resort to force. The court stated:

> "The argument that the disposition, character, and reputation of Lyman are not evidence that he assaulted Fox is sound. The difficulty with the defendant's case is that, while the evidence was not admissible for that purpose, it was clearly admissible to prove the reasonableness of the mode of defense from threatened attack adopted by Fox. As the evidence was admissible for some purpose, a general exception to it was unavailing."

To avoid confusion of issues and to foreclose the jury from using the reputation evidence to convict defendants on the "bad man" theory, the court below, upon admitting the testimony in question, instructed the jury as to the limited consideration which might be given.[35] The subject was again dealt with in the

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[35] ". . . there is an old basic principle in American law respecting the trial of criminal cases, and that is that the reputation of a defendant is just not the thing in issue. You are trying a specific charge or a specific group of charges that are set forth in the indictment.

"Now, a person who is, generally speaking, a fine upstanding citizen might occasionally go out and commit an occasional crime, and a man who has a bad reputation might never commit one. He might not deserve the reputation, because reputation is something different from character. Character is the quality of person you are and reputation is what is believed in certain quarters regarding certain aspects of your life. It might be justified. It might not.

"So it would be very easy, unless the jury disciplines itself to consider the evidence for the purpose for which it is ad-

court's charge to the jury. We have no doubt but that to the maximum extent possible, prejudice flowing from any confusion of issues by the jury was eliminated.

There can be no question of unfair surprise. A pre-trial offer of proof upon this matter was made by the prosecution thirteen months before the trial commenced.

We conclude that the district court did not err in denying Sica's motion to dismiss the indictment or in admitting the evidence of Sica's reputation.

ANONYMOUS THREATENING TELEPHONE CALLS

In our statement of the facts we have recounted the receipt by Don Chargin of an anonymous telephone call just prior to his leaving for Los Angeles in connection with negotiations with Leonard to take over the Hollywood Boxing and Wrestling Club. The caller warned Chargin to stay out of Hollywood.

Appellants objected to this testimony as irrelevant for lack of connection to any of the appellants and highly prejudicial. After a considerable discussion of the objection out of the presence of the jury, the court concluded:

"I think the problem will be one for the jury. I have an ancillary problem, to properly instruct them.

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mitted, to get off on the track of whether or not a particular defendant has a reputation of a certain kind or other.

"Now, it is contended here by the Government that this witness Leonard was put in fear of Mr. Sica and I think they are entitled to show or have Mr. Leonard tell why he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way."

You are invited to submit instructions on it, but the objections are overruled."

The jury was then advised by the court:

"The jury must of course bear in mind that the witness says this is anonymous. Now, what's anonymous ordinarily in life doesn't mean much, but sometimes what is anonymous is anonymous in form and you can fit it into the context of things. Whether this is the first situation or the second is going to depend upon the total context of the case, and just don't go deciding the issue on it until you have heard all the evidence and the instructions."[36]

Admission of this testimony under the circumstances is assigned as error.

The fact that Chargin could not identify the speaker does not necessarily render this testimony inadmissible. If identity could be found by the jury from other circumstances, admission of the testimony was proper.

The issue of authenticity—the identity of the author of a particular item of evidence such as a document or phone call—is for the jury once a prima facie case of authorship is made out by the proponent of the evidence.[37] The connection between a telephone

[36]No instructions upon this subject were offered.

[37]United States vs. Tellier, 2 Cir., 1958, 255 F. 2d 441, cert. den., 358 U. S. 821 (1958). See 7 Wigmore on Evidence, §2135; McCormick on Evidence, §194, Model Code of Evidence, Rule 601(a) (1942). That the procedure for handling the issue differs from that which we found proper with respect to declarations of co-conspirators is explained by the text writers. McCormick, supra at page 407, states:

"It must be noticed, however, that authenticity is not to be classed as one of those preliminary questions of fact conditioning admissibility under technical evidentiary rules

call and the caller may be established circumstantially.[38] The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent. The scope of appellate review upon this issue is confined to determining whether the admission constituted abuse of judicial discretion in determining that a prima facie case had been made out.[39]

Upon the record we cannot say that the admission of this testimony constituted abuse of discretion.

Daly, a member of the conspiracy, had told Leonard that this warning would most likely be given by the conspirators and why. A month prior to the warning Sica had surreptitiously contracted Leonard's assistant and attempted to have him ascertain when Chargin planned to be in town and where he could be reached by telephone.

These facts, plus the manner in which the warning so obviously fitted into the conspiracy scheme, are suf-

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of competency or privilege. As to these latter, the trial judge will permit the adversary to introduce controverting proof on the preliminary issue in support of his objection, and the judge will decide this issue, without submission to the jury, as a basis for his ruling on admissibility. On the other hand, the authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and relevance, as the jury can readily understand, and if a prima facie showing is made, the writing or statement comes in, with no opportunity then for evidence in denial. If evidence disputing genuineness is later given, the issue is for the jury."

[38]Andrews vs. United States, 10 Cir., 1935, 78 F. 2d 274. See 7 Wigmore on Evidence, §2155(1)(b).

[39]See Wigmore on Evidence, §2135 and cases cited therein; McCormick on Evidence, §194.

ficient to warrant reasonable men in concluding that the telephone call had been made by or at the direction of one of the conspirators in furtherance of the conspiracy, and thus, irrespective of the precise identity of the speaker, was binding on all appellants.

Appellants also assert as irrelevant and prejudicial Leonard's testimony to the effect that he had received threatening telephone calls between May 20 and November 1, 1959.

This testimony was given on redirect examination. On cross-examination appellants had attempted to impeach Leonard's credibility by showing that he had through his wife corruptly expressed a willingness to suppress his testimony and depart the country if he were paid $25,000.00.

On redirect examination the United States sought to explain this offer as founded not on corruption but on fear. The testimony of the threatening telephone calls was relevant to this issue and constituted a proper method of rehabilitating the witness.[40] The resulting prejudice was carefully minimized by the prosecution. The contents of the calls were not divulged to the jury.

We conclude that it was not error to permit testimony as to the anonymous threatening telephone calls.

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[40]See Bracey vs. United States, D. C. Cir., 1944, 142 F. 2d 85, 89, cert. den., 322 U. S. 762; 4 Wigmore on Evidence, §1119; McCormick on Evidence, §49.

MISCELLANEOUS MATTERS OF EVIDENCE

Sica asserts as error the admission of testimony given by Leonard with reference to one Tom Stanley. Leonard testified that Stanley, a friend of Sica's, had called on him on occasions at about the time the indictments were handed down, seeking to persuade Leonard not to give testimony in appellants' trial. On two occasions Stanley had been accompanied by one Steve Calla. Stanley had stated to Leonard that Calla was a friend of Sica's and a convicted murderer. In Leonard's words, "He said Mr. Calla had been in the penitentiary in Cleveland for murder and I said 'Murder?' He said 'Yes, he beat them to death. He was a strong-arm man.'"

Sica contends that this testimony by Leonard of conversations had with Stanley constituted hearsay.

There can be no question but that the testimony was inadmissible for the purpose of establishing that what Stanley had said was true. It was not admitted for this purpose, however. Its purpose was to impeach and discredit Stanley as a witness.

Stanley had been called as a witness by Sica and had given testimony which, if believed, would have reflected upon the credibility of Leonard. The government sought to show bias and complicity upon Stanley's part; that even though he was not named as a co-conspirator, he was actively engaged in furthering the ends of the conspiracy.

Also, as in the case of the anonymous telephone threats to Leonard, the testimony had the purpose of showing Leonard's state of mind at a time when he was

charged with having corruptly proposed to appellants that for a consideration he would avoid the giving of testimony by leaving the country.

In both these respects the testimony was relevant and competent.[41] The question was not whether what Stanley said was true but whether Stanley had said it. This was made clear by the court in an admonition to the jury.

We find no error in the admission of this testimony.

Sica charges the government with misconduct in asking on cross-examination whether he had been convicted of the crime of bookmaking.

On direct examination Sica had testified with respect to his felony record and had admitted to two convictions. On cross-examination he had admitted a third. He was then asked whether in 1951 he had been convicted of a conspiracy to violate certain sections of the Penal Code of California relative to bookmaking. In colloquy following objection by Sica's counsel, it appeared that although the exemplified copy of judgment in the government's possession denominated the crime as a felony, a misdemeanor type of sentence had been imposed rendering the conviction one for misdemeanor.

Counsel for Sica then moved to strike the question and asked the court to instruct the jury to disregard it. This the court did to the express satisfaction of Sica's counsel, who conceded that the government apparently had acted in good faith. The following day Sica's counsel, reversing his judgment as to the good

[41] See 3 Wigmore on Evidence, §§948-949, 956, 960.

faith of the government, moved for mistrial. The motion was denied.

In our judgment, the court acted properly. We note that the question under attack never was answered. We have difficulty finding any prejudice. Sica had admitted three felony convictions including robbery. A jury suspicion that he may also have been convicted of a misdemeanor would not seem to add measurably in the credibility balance. Furthermore, the admonition of the judge was clear and commanding and in our judgment was an adequate remedy.

We conclude that it was not error or abuse of discretion to deny Sica's motion for mistrial.

Nesseth and one other witness, McCoy, were permitted over objection to testify to conversations had with Leonard, during which Leonard had recounted to them the threatening statements made to him by Carbo. Carbo asserts that this testimony was inadmissible as hearsay.

Leonard had already testified to the fact that these threats had been made. The testimony of Nesseth and McCoy was relevant proof of the state of mind of Leonard and of the effect which the threats had had upon him. It was competent evidence for this purpose and its admission was not error.

Appellants assert error in the admission of testimony by Leonard as to extortionate demands by Carbo not related to those here in issue. In our judgment, these were relevant in bearing upon intent and in showing Carbo's general plan or scheme to dominate the boxing field.[42]

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[42]See Bush vs. United States, 9 Cir., 1959, 267 F. 2d 483, 489; 2 Wigmore on Evidence, §§300, 302, 304.

Carbo in his briefs has listed fifteen items of evidence which he contends were irrelevant and prejudicial. As to the bulk of these we do not regard them as irrelevant. To the extent that they were we find no prejudice. In any event, they did not form the basis of any assignment of error.

Appellants contend that evidence of the Daly-Leonard conversation should not have been admitted since that conversation did not serve to further the conspiracy. We think it obvious that it did.

CHARGE TO THE JURY

Rule 30, F.R.Cr.P., provides that any party may file requests for instructions and that "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed."

Appellants filed extensive requests for instructions. The district court advised appellants that he rejected all requests in the forms submitted because of their prolixity and confusing draftmanship. He did not take issue with the propositions of law so presented, but refused to inform counsel as to the precise form his charge would take. Appellants assert that this is a violation of Rule 30 and reversible error.

Assuming arguendo that this constituted a violation of the rule as strictly read, we find no prejudice. The charge was proper, as we shall discuss. Appellants' arguments to the jury consumed four days and no suggestion has been given us as to how they might have been made more effective had the court fully and

precisely disclosed the substance of its charge. Therefore, we find no reversible error.[43]

In one respect appellants were placed at a disadvantage by virtue of the court's method of procedure: It was rendered difficult for them to comply with the requirement of Rule 30 that error in the giving of instructions may not be asserted unless objection is made before the jury retires to consider its verdict. The government here asserts that appellants are foreclosed by this provision of the rule from asserting error in the charge. In our judgment, this provision should not apply under such circumstances as we find here. We therefore proceed to a consideration of those errors assigned by appellants relative to the charge:

Appellant Gibson presented evidence of good character and assigns as error the district court's failure to instruct the jury that such evidence alone may create a reasonable doubt of guilt.

Upon this proposition of law the circuits are divided. The Tenth (joined by the Seventh) holds in accordance with Gibson's contention.[44] The remaining circuits do not require any more than that the jury be freely permitted to consider character evidence along with all other evidence upon the issue of guilt.[45] Such is the rule in this circuit.[46]

It is in the interpretation of Edgington vs. United States, 1896, 164 U. S. 361, that the circuits appear

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[43]Watada vs. United States, 9 Cir., 1962, 301 F. 2d 869, 870.

[44]Peterson vs. United States, 10 Cir., 1959, 268 F. 2d 87.

[45]See footnote 3 of the Peterson case, supra (our footnote 44) at page 89.

[46]Kaspar vs. United States, 9 Cir., 1955, 225 F. 2d 275, 278-279.

to differ. There the Supreme Court stated, at page 366:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

In support of Gibson's position, a dictum in Michelson vs. United States, 1948, 335 U. S. 469, 475, referring to the privilege of introducing character evidence states:

> "This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. Edgington vs. United States, 164 U. S. 361."

Edgington, however, did not say or suggest that character evidence is so highly probative that it must, upon penalty of reversal, be singled out from the bulk of the testimony for special treatment. In Edgington the court was faced with an instruction which confined the jury's consideration of character evidence to cases where the evidence was in conflict or where

the rest of the evidence created a doubt of guilt. It held such limitation improper. It did not hold that the lack of limitation must be expressly pointed out to the jury.

Here the district court charged:

> "The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole."

The court went further, however, even approaching Gibson's proposed instruction. It gave as an example a Governor of the State of New York accused of robbery and, with repeated reference to this example, pointed out that "it would be very, very unlikely that a person of that reputation would be out as a stick-up man." It thus strongly suggested to the jury that it might find it improbable that a man of good reputation would commit a particular crime.[47]

Under the view of the law adopted by this court, the instructions upon this point were adequate.

Appellants claimed that the trial court failed to make a finding that the defendant's activities complained of affected interstate commerce so as to sustain federal jurisdiction. The judge instructed the jury that "if boxing matches are in fact televised and television is sent into other states, that brings it within ambit of interstate commerce." This was sufficient.[48]

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[47]Compare Alverez vs. United States, 9 Cir., 1960, 282 F. 2d 435, 436.

[48]Hulahan vs. United States, 6 Cir., 1954, 214 F. 2d 441, 445-6, cert. den., 348 U. S. 856 (1954).

Appellants assert error in the instruction relative to the necessity for proof of overt acts in order to establish conspiracy under § 371. The court charged

> "It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid."

Appellants contend that it was error to tell the jury that an act done at the direction of the defendants or with their aid would satisfy the requirement.

We disagree. 18 U. S. C. §2(b) recognizes the principle of criminal agency in the federal law. It provides:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Furthermore, an instruction in accordance with appellants' views was given elsewhere in the charge. While appellants contend that this constitutes at best a conflict between instructions, we find no prejudice resulting. Since both Carbo and Palermo were found guilty on their substantive counts, the jury clearly found that overt acts had been committed by these defendants on both conspiracy counts.

Appellants assert that an instruction on aiding and abetting was confusing. We do not find it so. They assert that the court failed to instruct clearly on reasonable doubt. We regard the charge as perfectly

clear. They criticized the court's explanation of the division of functions between court and jury as tending to lull the jury into a sense that their responsibility was not final. We disagree. We find no merit in appellants' complaint that the court failed to define the term "underworld."

MISCELLANEOUS ASSIGNMENTS OF MISCONDUCT, VIOLATION OF DUE PROCESS AND OTHER MATTERS.

Appellants assert that they were denied due process because the prosecution permitted false evidence to go uncorrected.

Leonard was caught up in a falsehood with reference to his alleged solicitation of hush money from appellants. He testified that it was his wife and not he himself who had acted in this respect. A tape recording of a conversation between Leonard and Palermo, introduced by appellants, demonstrated the contrary. Appellants' position is that the government thus solicited false testimony and failed adequately to apprise the jury of the truth, relying on Napue vs. Illinois, 1959, 360 U. S. 264.

In that case denial of due process lay in the fact that the truth, known to the prosecution to be contrary to its witnesses' testimony, was never brought home to the jury. Here the truth, known to the defendants, was brought home to the jury in the most effective possible way. Furthermore: government counsel in argument to the jury conceded that Leonard was not testifying truthfully in this regard.

Defendants appear to be contending that when a government witness has been discredited in one respect,

the United States is obligated to disown him. We disagree. When the falsity of testimony is brought home to the jury, it remains the jury's function to determine to what extent that witness' testimony is otherwise worthy of belief.

Gibson contends that he was promised that his indictment would be dismissed. We find no substantial or credible evidence tending to show such a promise. In other respects, appellants protest that there was misconduct and deprivation of fair trial; alleged distortion of evidence by the government in closing argument; permitting Nesseth and McCoy to sit before the bar of the court during closing arguments so that government counsel might point them out; the court's interupting Carbo's counsel with questions during his argument. In none of these matters do we find merit.

Appellants contend that they have been denied due process and equal protection of the laws through denial of bail during trial. These contentions have already been made to this court in two prior appeals and there disposed of.[49]

Gibson, being of the colored race, asserts that unconstitutional discrimination occurred in the selection of the jury venire through systematic exclusion of Negroes. There was no proof of exclusion; only of the fact that out of fifty veniremen none was a Negro. Testimony of the clerk of the court as to the manner of selection effectively refuted this contention, and Gibson's offered proof of racial population statistics

[49]Carbo vs. United States, 9 Cir., 1961, 288 F. 2d 282; Carbo vs. United States, 9 Cir., 1961, 288 F. 2d 686, cert. den., 1961, 365 U. S. 861.

would not have been persuasive to the contrary. "Purposeful discrimination is not sustained by showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals." Akins v. Texas, 1945, 325 U. S. 398, 403.[50]

Appellants contend that the district court's method of handling challenges to the jury violated Rule 24(b) in that it did not assure the defendant their minimum number of challenges. The district judge required each side simultaneously to submit their challenges in writing to the clerk. The same juror might thus have been challenged by both sides. This is not improper.[51]

Gibson asserts that he was allowed only one challenge as to the three alternate jurors while Rule 24(c) grants him two challenges. This matter, however, was never presented to the district court and must be considered as waived.

Gibson contends that he was improperly denied severances. We disagree. The substantive counts in which Gibson was not charged still constituted overt acts attributable to him on the two conspiracy counts in which he was charged.

RULINGS OF THE SUCCESSOR JUDGE

Following trial and jury verdict and while motions for new trial by all appellants and a motion for acquittal by Appellant Dragna were pending before him, Judge Ernest A. Tolin, the trial judge, died. Judge

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[50]See also Cassell vs. Texas, 1950, 339 U. S. 282, 286-7.

[51]Pointer vs. United States, 1894, 151 U. S. 396, 412; Hanson vs. United States, 9 Cir., 1959, 271 F. 2d 791, 792-3.

George H. Boldt was assigned to succeed him. A supplemental motion for new trial was made by all appellants under Rule 25, F.R.Cr.P.,[52] upon the ground that judicial duties in the case could not be properly performed by a successor judge. All motions were denied and Judge Boldt proceeded to impose sentence. This is assigned as abuse of discretion.

Appellants rely heavily upon dicta in Connelly v. United States, 8 Cir., 1957, 249 F. 2d 576, 580, cert. den., 356 U. S. 921 (1958), reh. den., 354 U. S. 964 (1958), where, in upholding a successor judge's decision that he could properly proceed, the court stated:

> "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character."

Appellants assert that this case is precisely of such character; that it depends almost in its entirety upon the testimony of Leonard and Nesseth, which was flatly

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[52] "If by reason of absence from the district, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

contradicted by the appellants' witnesses in many material respects; that credibility of witnesses was of the essence of the case.

Accepting the statement in Connelly, we do not apprehend that where credibility of government witnesses is a serious issue, it must follow ipso facto that a new trial must be had. In Bennett vs. United States, 5 Cir., 1960, 285 F. 2d 567, cert. den., 366 U. S. 911 (1961), the court held that the successor judge acted properly in passing upon defendant's new trial motion and in sentencing him even though the facts were in dispute and the resolution of factual dispute by the jury was dependent upon demeanor.

Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence. We should be inclined to emphasize demeanor rather than credibility as the vital factor upon the question here presented. The inquiry then would seem to be as to how importantly demeanor appears to loom in making the necessary credibility determinations.

Here Judge Boldt, before ruling on the supplemental motions for new trial, spent more than three months in a careful study of the record. 7,500 pages of transcript were condensed by him into an abstract of 1,320 pages. He concluded, in his memorandum order:

> "On the whole record this court is fully satisfied every defendant was accorded a fair trial, free from prejudicial error, and that the evidence thoroughly supports the verdict in every essential particular as to each defendant. The contentions of defendants which entailed a most exhaustive con-

sideration of the record and analysis of authority are those relating to the credibility of government witnesses, the admission in evidence of the recordings and their playing to the jury. The case against the defendants did not rest on the unsupported oral testimony of either Leonard or Nesseth or both. Their testimony, in all essential particulars, was fully and convincingly corroborated."

This conclusion with respect to the substance of the corroborating evidence was reiterated from the bench at the time of imposing sentence. At that time Judge Boldt also expressed his conviction, based upon actions and words of Judge Tolin, that Judge Tolin "had not the slightest doubt of the guilt of any of the defendants or of the credibility of the principal witnesses."

In the exercise of his discretion Judge Boldt has, in our view, concerned himself with the vital question. He has concluded, after most careful and conscientious study, that the corroboration Leonard and Nesseth received from other convincing evidence placed the government's case safely beyond demeanor impeachment and that Judge Tolin himself had not been disturbed by questions of credibility. His determination in this latter respect is reinforced, to some extent at least, by Judge Tolin's charge to the jury. He warned them to discount the effect fear and the courtroom atmosphere might have on witnesses and emphasized the virtue of appraising testimony by the manner in which it successfully integrated with other evidence.

We do not find abuse of discretion in the action of Judge Boldt in proceeding as successor judge under Rule 25, to the completion of the judicial proceedings in the district court.

DECISION

As to Appellant Carbo, judgment affirmed.

As to Appellant Palermo, judgment affirmed.

As to Appellant Gibson, judgment affirmed.

As to Appellant Sica, judgment upon Counts 1 and 4 affirmed. Judgment on Count 5 reversed and the case remanded with instructions that judgment on this count be set aside.

As to Appellant Dragna, judgment reversed and the case remanded with instructions that judgment be entered for this defendant.

(Endorsed) Opinion Filed Feb. 13, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Paul John Carbo, et al., Appellants, vs. United States of America, Appellee. No. 17,762.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment in this Cause be, and hereby is affirmed as to appellants Carbo, Palermo and Gibson; that judgment as to appellant Sica is affirmed upon Counts 1 and 4 and on Count 5 judgment is reversed and the case remanded with instructions that judgment on this count be set aside.

Filed and entered February 13, 1963.

APPENDIX C.

Constitutional Provisions and Statutes Involved.

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

18 U. S. C. 371 (62 Stat. 701) provides in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U. S. C. 875(b) (62 Stat. 741) provides:

"(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

18 U. S. C. 1951 (62 Stat. 793) provides in pertinent part:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 25, Federal Rules of Civil Prcoedure, provides:

"If by reason of * * * death * * * the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial."

APPENDIX D.

Requested Instructions re Declarations of Alleged Co-Conspirators Outside the Presence of Defendants.

C. T. 644:

"There are a number of steps which you must follow in order to determine whether a defendant was a member of a conspiracy.

"First, you must find that there was a conspiracy;

"Second, you must consider all the evidence directly relating to a defendant in order to determine whether he was a member of that conspiracy. In determining whether he was a member or not you cannot consider any conversations which were made when he was not present. In determining whether he was a member, you cannot consider any acts done by others in his absence; and,

"Third, only if you find beyond a reasonable doubt that a conspiracy existed and that a defendant was a member of the conspiracy can you consider conversations of and acts done by co-defendants or alleged co-conspirators against an absent defendant.

"In other words, in considering whether or not a defendant on trial was a member of the conspiracy charged, you must do so without regard to, and independently of, the statements, acts, and declarations of others in his absence."

C. T. 646:

"The existence of the conspiracy, and each defendant's connection with it, must be established by independent proof, bases upon the reasonable inferences to be drawn from such defendant's own actions, his own conduct, his own declarations."

C. T. 647:

"You will recall that tesimony (sic) of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tenative (sic) basis is destroyed and all such testimony must be ignored as to him.

"A defendant's connection with a conspiracy must be established beyond a reasonable doubt; accordingly, by his own conduct and his own statements or declarations."

C. T. 659:

"The existence of a conspiracy cannot be established against an alleged conspirator, by the testimony of an alleged co-conspirator as to his acts or declarations. The conspiracy must first be established by independent proof."

C. T. 660:

"Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with conspiracy."

C. T. 714:

". . .

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or

done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did." To the same effect: C. T. 705. C. T. 725:

"No evidence of an act or declaration of an alleged conspirator shall be binding upon or considered against any other alleged conspirator unless and until, independent and without the aid of such evidence, a conspiracy as alleged, and of which both such persons were members, has been proved to have been in existence at the time of such act or declaration; . . ."